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RECORD, CASE No. 13,625.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~498~~. 80

EUGENIA A. ROGET, EXECUTRIX OF EDWARD A. ROGET, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 4, 1889.

RECORD, CASE No. 13,625.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 408.

EUGENIA A. ROGET, EXECUTRIX OF EDWARD A. ROGET, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1892.

1 In the Court of Claims.

EUGENIA A. ROGET, Executrix of Edward A. Roget,
vs.
THE UNITED STATES. } 16288.

I.—*Petition. Filed July* 24, 1888.

The petition of Eugenia A. Roget respectfully shows to your honors:

I. That she resides in Annapolis, Maryland, and is executrix of the last will and testament of Edward A. Roget, deceased.

II. That her said testator was, on the 21st day of May, 1864, appointed a professor of mathematics in the Navy of the United States, and on the 1st day of August, 1864, being then sixty-two years of age, he was placed on the retired list of said navy, under section 1 of the act of Congress approved December 21, 1861 (12 Stats., 329).

III. That under section 2 of said act petitioner's testator, under orders of the Navy Department, was continued on and performed active duty until June 30, 1873, at the Naval Academy, and received active-duty pay.

2 IV. That by section 3 of the act approved July 15, 1870 (16 Stats., 331, now R. S., 1556), the duty pay of a professor of mathematics was fixed at $2,400 per annum for the first five years, $2,700 for the second five years, $3,000 for the third five years, and $3,500 after fifteen years from date of appointment, and that petitioner's testator, under said act, was paid at the rate of $2,700 per annum from July, 1870, to June 30, 1873.

V. That by section 1 of the naval appropriation act of March 3, 1873 (17 Stats., 547), the employment of retired officers on active duty was prohibited, except in time of war, and that petitioner's testator was relieved from such duty June 30, 1873.

VI. That by another clause of the same last-named act and section (now substantially embodied in the first clause of sec. 1588 R. S.) it was provided that the pay of the officers retired on account of age, length of service, and other causes should be seventy-five per centum of the present sea pay of the grade or rank which they held at the time of their retirement.

VII. That from the first day of July, 1873, petitioner's testator was only allowed (to November 9, 1887, when he died) pay at the rate of $1,800 per annum, or three-fourths of the sea pay of a professor in his first five years, notwithstanding that he had performed over nine years of active duty.

VIII. Your petitioner further shows that section 1 of the naval appropriation act of March 3, 1883 (22 Stats., 473), provided that "all officers of the navy shall be credited with the actual time they may have served" * * * "and shall receive all the benefits of such actual service."

Your petitioner claims that under said act of 1883 her testator

should have been credited with the time of his active service, from May 21, 1864, to March 3, 1873, and should have received
3 the difference between the retired pay of a professor in his first five years and a professor in his second five years, or $225 per annum, from July 1, 1873, to the date of his death aforesaid—14 years and 122 days.

Wherefore your petitioner prays judgment in the sum of $3,200.

Your petitioner says that she is the sole owner of this claim and has never assigned or disposed of it or any part of it to any person, and that she is justly entitled to the amount thereof after allowing all just credits and offsets.

EUGENIA A. ROGET,
Executrix, etc.,
By JOHN PAUL JONES, *Attorney.*

John Paul Jones, being first duly sworn, on oath says that he is the attorney of the petitioner named in the foregoing petition, and that he believes the matters and things therein stated to be true.

JOSEPH W. AMAN,
Com'r C't of Cl's.

4 II.—*General Traverse. Filed by Defendants November* 24, 1888.

In the Court of Claims of the United States, December Term, A. D. 1888.

EUGENIA A. ROGET, Ex'r,
vs.
THE UNITED STATES. } No. 16288.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney General.

5 III.—*Argument and Submission of Case.*

JANUARY 22, 1889.

At a Court of Claims held in the city of Washington on the 22nd day of January, A. D. 1889—

The cause of Eugenia A. Roget, executrix of Edward A. Roget, was argued by Mr. Lines, for the claimant, and Mr. Dewees, opposed, and submitted.

6 IV.—*Findings of Fact. Filed by the Court February* 11, 1889.

This case having been heard before the Court of Claims, the court, from the evidence, finds the fact- to be as follows:

I.

July 8, 1864, the claimant's testator was commissioned a professor of mathematics in the navy, to rank from May 21, 1864.

II.

August 1, 1864, he became sixty-two years of age, and was on that day placed upon the retired list.

Notwithstanding such retirement he was continued on active duty on shore until June 30, 1873.

III.

While performing such duty he received the full shore pay of his grade, including the increase after five years' service therein provided by section 3 of the act of July 15, 1870 (16 Stat., 331).

IV.

From July 1, 1873, to November 9, 1887, when he died, he received only three-fourths of the pay prescribed in the act of 1870 and section 1556, Revised Statutes, for a professor in his first five years of service.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as conclusion of law, that—

An officer in the navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled under the act of March 3, 1883 (22 Stat., 473), to a greater rate of pay after active service ceased than 75 per centum of the pay for the grade or rank which he held at the time of retirement.

7 V.—*Opinion of the Court. Filed February* 11, 1889.

SCOFIELD, *J.*, delivered the opinion of the court:

The claimant is the executrix of Edward A. Roget, deceased, late a professor of mathematics in the navy, and seeks to recover $3,200, alleged to be due the decedent's estate, under the act of June 3, 1883 (22 Stat., 473). That act is as follows:

And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits

of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy, in the lowest grade having graduated pay held by such officer since last entering the service: Provided, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: Provided, further, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy.

The facts are as follows:

July 8, 1864, the decedent was commissioned a professor of mathematics in the navy, to rank from May 21, 1864.

August 1, 1864, less than a month after being so commissioned, he became sixty-two years of age, and on that day was placed upon the retired list, under the act of December 21, 1861 (12 Stat., 329; R. S., sec. 1444).

Notwithstanding such retirement he was continued on active duty until June 30, 1873, at which time he was relieved under the act of March 3, 1873 (17 Stat., 547; R. S., sec. 1462).

While performing such duty he received the full shore pay of his grade ($2,400 a year) during the first five years of service, and thereafter $2,700 a year, under the act of July 15, 1870 (16 Stat., 33).

From July 1, 1873, until his death, November 9, 1887, he was paid at the rate of $1,800 a year, which was 75 per cent. of the pay for the grade which he held at the time of retirement (R. S., sec. 1588).

Upon these facts the claimant contends that the act of 1883, above quoted, in effect provides that the decedent's pay shall be calculated as if all his service had been rendered on the active list and he had been retired July 1, 1873, in his second five years of service, instead of August 1, 1864, in his first. In other words, we are to antedate the retired service and postdate the time of retirement.

This construction would entitle the claimant to recover, at the rate of $225 a year, from July 1, 1873, to November 9, 1887.

We do not agree to this construction. In the case of The United States *v.* Foster (128 U. S.), the Supreme Court said:

The acts of 1882 and 1883 do not require or authorize a restatement of the pay accounts of an officer of the navy who served in the regular or volunteer army or navy, so as to give him credit in the grade held by him prior to their passage for the time he served in the army or navy before reaching that grade. Congress only intended to give him credit in the grade held by him, after those acts took effect, for all prior services, whether as an enlisted man or officer, counting such services, however separated by distinct periods of time, as if they had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service.

The petition of the claimant will be dismissed.

8 VI.—*Judgment of the Court. Entered February* 11, 1889.

EUGENIA A. ROGET, Executrix of Edward A. Roget,
vs.
THE UNITED STATES. } 16288.

At a Court of Claims held in the city of Washington on the 11th day of February, A. D. 1889, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

9 VII.—*Application of Claimant for and Allowance of Appeal, April* 8, 1889.

EUGENIA A. ROGET, Executrix of Edward A. Roget,
v.
THE UNITED STATES. } 16288.

Comes now the claimant, by John Paul Jones, her attorney, and prays the court for the allowance of an appeal to the Supreme Court of the United States from the decision rendered in the above-entitled cause dismissing claimant's petition. Allowed.

10 VIII.—In the Court of Claims.

EUGENIA A. ROGET, Executrix of Edward A. Roget,
vs.
THE UNITED STATES. } 16288.

I certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment of the court dismissing the petition, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States, & of the findings and opinion.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at the city of Washington, on this third day of September, A. D. 1889.

ARCHIBALD HOPKINS,
Chief Clerk, Court of Claims.

Endorsed on cover: Case No. 13,625. Court of Claims. No. 408. Eugenia A. Roget, executrix of Edward A. Roget, deceased, appellant, *vs.* The United States. Filed September 4, 1889.

148 US 161

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

EUGENIA A. ROGET, Appellant,

vs.

THE UNITED STATES, Appellees.

No. 80.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel for Appellant.

Press of McGILL & WALLACE, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

EUGENIA A. ROGET, Adm'x, Appellant,
vs.
THE UNITED STATES.
No. 80.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

STATEMENT OF CASE.

The appellant is the executrix of Edward A. Roget, late professor of mathematics in the United States Navy, who died November 9, 1887. Prof. Roget was commissioned professor of mathematics May 21, 1864, and on the 1st of August, 1864, having reached the age of 62 years, was placed upon the retired list, as required by the act of December 21, 1861. (12 Stats., 329; R. S., 1444.)

Under section 2 of said act of 1861 decedent's employment on active duty at the Naval Academy was continued until June 30, 1873, when he was relieved from such duty under a proviso of section 1 of the act of March 3, 1873 (17 Stats., 547), which prohibited the active employment of retired officers except in time of war.

Under the navy pay act of July 15, 1870 (16 Stats., 321, 331), the pay of professor of mathematics when on duty, whether at sea or on shore, was fixed at $2,400 per annum for the first five years after date of appointment, and at $2,700 per annum during the second five years after such date. Professor Roget was paid at the rate of $2,700 per annum from 1869 to June 30, 1873, as a professor of mathematics in his second five years, under section 2 of the act of 1861 (*supra*), which provided that he should receive "the full shore pay of his grade while so employed."

Section 1 of the act of March 3, 1873 (*supra*), provided that officers retired on attaining the age of 62 years should receive 75 per centum of the sea pay of the "grade or rank which they held at the time of their retirement."

The accounting officers of the Treasury now held that Professor Roget should receive only 75 per centum of the sea pay of a professor of mathematics in his first five years, to wit, $1,800, and paid him at that rate until his death in 1887. Claimant brought suit for the difference between $1,800 and $2,025 per annum under the "longevity-pay" provisions of naval appropriation acts of August 5, 1882 (22 Stats., 284, 287), and March 3, 1883 (*Ib.*, 472, 473). The petition was dismissed by the court below, from whose judgment she took this appeal.

Assignment of Errors.

The court erred—

1. In holding that claimant's testator was not entitled under the acts of 1882 and 1883 to credit for all of his actual service in fixing his pay.

2. In dismissing claimant's petition.

ARGUMENT.

The longevity-pay provisions of the acts of 1882 and 1883, which have frequently been before this court for construction, are as follows:

The act of 1882 (22 Stats., 287):

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy."

Act of 1883 (22 Stats., 473):

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officers since last entering the service."

The intent and scope of these provisions, as construed by this court and the Court of Claims, was to give all officers in the navy who had at any time held a grade in which the pay was graduated according to length of service in such grade, credit for all prior service which had theretofore been uncredited on any grade or commission.

In some cases such prior uncredited service had not been continuous with the later service, although in the same grade and in the Regular Navy. In other cases it had been in the volunteer navy, or in the army, as officer or enlisted man. In other cases, though the prior service had been in the Regular Navy and continuous with the later service, it had been in a grade in which the pay was not graduated by law according to length of service. The act of 1882 was intended to leave no service of any sort uncredited. The reasons why it failed of effect in some cases, and why the amended act of 1883 became necessary, are set forth in U. S. *v.* Rockwell, 120 U. S., 60.

It has not heretofore been contended that the term, "all officers of the navy," in the acts of '82 and '83 does not embrace officers on the retired list. In U. S. *v.* Tyler, 105 U. S., 244, it was held that the words, "each commissioned officer," included officers of the army on the retired list, as well as those on the active list. In U. S. *v.* Dunn, 120 U. S., 249, the benefits of the legislation of 1882 and 1883 were allowed to a retired officer of the navy, and in Bradbury *v.* U. S., 20 Ct. Cls., 187, it was held that a master in the navy, retired as such in 1871, was entitled, under the acts of 1882 and 1883, to have his retired pay as master increased because of an uncredited term of service as mate before his appointment as master. Thus the broad (and true) construction of the acts of 1882 and 1883 has been that if any officer of the navy, active or retired, had performed "actual service" for which he had received no credit, those acts required such "actual service" to be credited, and the pay, active or retired, to be correspondingly increased from the date when such credit would have increased it if originally given.

The only question in this case, therefore, would seem to be whether Professor Roget's nine years of duty, from 1864 to 1873, under a statute expressly authorizing such employment after retirement, was "actual service." If so, the acts of 1882 and 1883 expressly require it to be credited.

If this be the question at issue, we respectfully submit that there can be but one solution, and that favorable to appellant. To appoint an officer within three months of the age at which the law retires him, to employ him nine years thereafter under another provision of law, and then to say that his "actual service" consists of only three months, would seem the height of absurdity as well as injustice. Suppose the law authorized the courts under certain circumstances to assign retired judges to duty exactly such as they performed before retirement, would not service under such assignment be "actual service?"

The learned counsel for defendants ignored this issue in the court below, and argued the case as though the acts of 1882 and 1883 had not been passed. It was said that the prior law fixed Professor Roget's retired pay at 75 per cent. of the active pay of the "grade or rank" held at retirement; that the act of 1861 gave him the "full shore pay of his grade," including longevity pay, only while on duty, and that the accounting officers were right both in paying him as a professor of over five years' service from 1869 to 1873, and as a professor of only three months' service after 1873. Suppose this to be true, it only shows one of the motives for the legislation of 1882 and 1883. The prior law prevented officers on both the active and retired lists from receiving credit for actual service. The legislation of 1882 and 1883 changed the prior law for both lists.

In U. S. *v.* Thornley, 18 Ct. Cls., 117, the court below said:

"The whole basis of longevity pay is the officer's capacity for duty and his performance of it; in other words, longevity pay is for longevity in *actual service.*"

But the decision in Thornley's case which denied credit for time passed on the retired list *in inactivity* was mainly relied on below by the defense to deny Roget longevity pay for longevity in actual service.

The opinion below in the case at bar was based solely on an authority not cited by defendants, but which we believe, with great respect, to be quite as inapplicable as those which were cited, viz.:

U. S. *v.* Foster, 128 U. S., 435.

Foster was a gunner in the navy who had been appointed as such after six years' service as an enlisted man. He served six years as gunner and resigned. After an interval he was reappointed gunner, and was serving under his second appointment or warrant when the acts of

1882 and 1883 were passed. Under those acts the accounting officers credited him on his second warrant with all his prior service both as gunner and enlisted man, thus increasing his pay from the date of his second warrant, but they refused to credit his enlisted service on his first warrant, which would have increased his pay from the date of his first appointment as gunner. He claimed credit for his enlisted service upon his first warrant, which the act of 1883 would have given him if his service as gunner had been continuous. But the court held that the act of 1883 did not reach back over the interval when he was out of the service, but operated only upon the period of service in which the act found him, or upon his pay, to use the words of the act, "since last entering the service."

The opinion says:

"Congress only intended to give him credit *in the grade held by him after those acts took effect* for all prior services."

Upon any possible interpretation of this language, which is quoted in and forms the whole basis of the opinion below, we do not see its application to the case at bar. Professor Roget never held but one grade in the navy, viz., the grade of professor of mathematics. He held that grade when the acts of 1882 and 1883 were passed. He had held it continually since his appointment. He had performed nine years' actual service in it and was being paid as though he had only served three months. To whom could the legislation of 1882 and 1883 be more justly applied?

The whole scope of the decision in United States *v.* Foster was to limit the application of the acts of 1882 and 1883 *to a particular period of service.* If an officer had been in and out of the service, as Foster had, the court limited the benefits of the legislation to that period in which he was serving when the acts were passed.

Although the opinion in United States *v.* Foster uses the term "grade," it is clear, both from the facts of that case and from prior decisions, that it was used in the sense of "period of service," for Foster's "grade," technically speaking, was the same in the period of service in which he was claiming credit as in the period in which he was serving when the acts of 1882 and 1883 were passed. It was the "grade" of gunner.

To interpret the term technically would not only make it inapplicable to the facts in Foster's case, but would make that decision a practical reversal of several well-considered interpretations of the same statutes by this court.

Thus in the case of U. S. *v.* Rockwell, 120 U. S., 60, the claimant was a lieutenant commander when the act of 1883 took effect, but the lowest grade held by him having graduated pay was the grade of lieutenant, and this court, affirming the decision of the Court of Claims, held that his accounts in the grade of lieutenant should have been restated to allow him credit in that grade for all services performed before he entered it.

In U. S. *v.* Baker, 125 U. S., 646, the claimant was a master at the time the act of 1883 was passed, having been promoted from the grade of ensign in 1876. This court, affirming the decision of the Court of Claims, held that all his services prior to that in the grade of ensign should be credited upon his commission as ensign, that being his lowest grade having graduated pay.

Under these decisions the accounts of all officers affected by the legislation, no matter what their grade or rank, when the act of 1883 was passed, were restated so as to give them credit for all uncredited service in the lowest grade having graduated pay held by them since last entering the service.

If the above be not the true interpretation of the decision in U. S. *v.* Foster, then that case distinctly overrules

the cases of U. S. *v.* Rockwell, and U. S. *v.* Baker, *supra*, and deprives the act of 1883 of its legitimate force in many, if not most cases. For it is apparent that between the time when graduated pay was introduced in the navy by the act of July 15, 1870, now section 1556, R. S., and the time of the passage of the act of 1883, very many, if not most officers would have passed by promotion from their "lowest grade having graduated pay," to another and higher grade, and in some cases to a grade like that of commander and its superior grades in the line to which no graduated pay is attached by law. Such officers, on any other interpretation of the opinion in U. S. *v.* Foster, could derive no benefit under the act of '83, and the words, "the lowest grade having graduated pay," would be shorn of all meaning.

We respectfully submit, therefore, that the decision in U. S. *v.* Foster has no application to the case at bar; that the acts of 1882 and 1883 require all "actual service" to be credited whether performed before or after retirement; and that the decision of the lower court should be reversed.

JOHN PAUL JONES.
ROBT. B. LINES.

1 OCT 1927

148 US 167

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

EUGENIA A. ROGET, EXECUTRIX, ETC.,
vs.
THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

W. H. H. MILLER,
Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

EUGENIA A. ROGET, EXECUTRIX, ETC., *vs.* THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

In this case the following is the finding of facts in the Court of Claims :

(1) July 8, 1864, the claimant's testator was commissioned a professor of mathematics in the Navy, to rank from May 21, 1864.

(2) August 1, 1864, he became sixty-two years of age, and was on that day placed upon the retired list.

Notwithstanding such retirement he was continued on active duty on shore until June 30, 1873.

(3) While performing such duty he received the full shore pay of his grade, including the increase after five years' service therein provided by section 3 of the act of July 15, 1870 (16 Stat., 331).

(4) From July 1, 1873, to November 9, 1887, when he died, he received only three-fourths of the

pay prescribed in the act of 1870 and section 1556, Revised Statutes, for a professor in his first five years of service.

Upon this finding of facts the following conclusion of law was stated :

> An officer in the Navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled under the act of March 3, 1883 (22 Stat., 473), to a greater rate of pay after active service ceased than 75 per centum of the pay for the grade or rank which he held at the time of retirement.

The contention of appellant is that, because after his retirement on August 1, 1864, her testator was in active shore service as professor of mathematics at the Naval Academy for about nine years, therefore after such active service ceased on June 30, 1873, his pay as a retired officer should have been graded by the rate he was receiving when his active service ceased, instead of by the rate he was receiving when originally retired.

The pay of an officer of testator's grade during the first five years after his appointment and at the time of his retirement, August 1, 1864, was at the rate of $2,400 a year. The pay of the same officer at the time he finally ceased from active duty on June 30, 1873, he being then in the second five years of service, was at the rate of $2,700 a year, and the question is whether, as a retired officer and after his active service ceased, he was entitled to be paid three-fourths of $2,400 a year, or three-fourths of $2,700 a year.

The act of December 21, 1861, under which this officer was retired, provides:

> SEC. 1. That whenever the name of any naval officer now in the service, or who may hereafter be in the service of the United States, shall have been borne on the Naval Register forty-five years or shall be of the age of sixty-two years, he shall be retired from active service, and his name entered on the retired list of officers of the grade to which he belonged at the date of such retirement.
>
> SEC. 2. That the President of the United States be, and he is hereby, authorized to assign any officer who may be retired under the preceding section of this act to shore duty, and such officer thus assigned shall receive the full shore pay of his grade while so employed.

The legal effect of these two sections was, first, to fix the time at which a naval officer might be retired and the grade of his rank thereafter; and, second, it authorized the President, notwithstanding such retirement, to assign such retired officer to active duty and gave to such retired officer in active duty full pay while such active duty continued. It did not, however, change his grade.

Section 5 provides—

> That all officers retired under the provisions of this act shall receive the retired pay of their respective grades as fixed by law.

As the law stood then, at the date of this retirement, the grade and payment of the officer as a retired officer was fixed, and could be varied only so long as he continued in active service under assignment by the President.

By the naval appropriatian act of March 3, 1873 (substantially reenacted in section 1588, Revised Statutes), retired officers are forbidden assignment to active duty, except in time of war, and their pay is fixed at 75 per centum of the pay of their grade in active service. Certainly nothing so far gives any color to the claim that the rate of pay is to be measured by the rate at any other time than at the date of the retirement. But it is contended that, by certain language in the act making appropriations for the naval service, approved March 3, 1883 (22 Stats., p. 473), this rule is changed. The paragraph of the act relied upon, after enumerating various purposes, such as secretaries for the admiral and vice-admiral, clerks for paymasters, and numerous items of incidental expenses, as embraced in the appropriation following, reads as follows:

> And for the payment of any such officers as may be in service, either upon the active or retired list, during the year ending June thirtieth, eighteen hundred and eighty-four, in excess of the numbers of each class provided for in this act, and for any increase of pay arising from different duty, as the needs of the service may require, three hundred thousand dollars. And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the

> dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy.

I am unable to see that these provisions of the act of 1883 have any application to the question under consideration. This officer was retired under the act of 1861 in 1864. By that retirement his status, rank, or grade was fixed. He was entitled to the pay as such retired officer belonging to that status, rank, or grade. If Congress by law had provided for an increase of pay for retired officers of his rank or grade, he would be entitled to the benefit of such provision. Congress did provide that for a time retired officers might be assigned to active duty and receive pay for such active service. While in such active duty rendering such active service he was entitled to be paid accordingly and received such pay. When, under the law, his active service ceased on June 30, 1873, he was remitted to his status as a retired officer of the grade he held when retired. It is not seen how the fact that this officer, by special assignment to active service after retirement, received higher pay than at the date of his retirement is more material than would have been the fact of his assignment or appointment to perform the duties of any civil office under which he might have received increased pay.

In *United States* v. *Foster* (128 U. S., p. 437), this court, speaking of this very act, says:

> The acts of 1882 and 1883 do not authorize or require a restatement of the pay accounts of an offi-

> cer of the Navy who served in the regular or volunteer Army or Navy so as to give him credit *in the grade* held by him *prior* to their passage, for the time he served in the Army or Navy before reaching that grade. Congress only intended to give him credit *in* the *grade* held by him *after those acts took effect*, for all prior services, whether as an enlisted man or officer, counting such service, however, separated by distinct periods of time, as if they had been continuous and in the regular Navy in the lowest grade having graduated pay held by him since last entering the service, and that credit has been given to the plaintiff.

If, before the death of this officer, Congress had provided for increased pay for retired officers of his grade on account of length of past service, this claim might be well founded, but no such statute is found, and the statute of 1883 can not be given such effect. The claim is based upon the theory that the officer was entitled to the same pay, being retired during the first five years of his service, as if he had been retired during the second five years, because, under the special provisions of the act of 1861, and under a special assignment by the President, he was performing active duty for nearly ten years after his retirement. Such a construction has no warrant either in statute or in principle, nor is it supported by any decision. (*Thornley* v. *United States*, 113 U.S., 310.) On the contrary, his rights must be measured by the provisions of the act of March 3, 1873 (17 Stats., p. 547), as follows:

> That no officer on the retired list of the Navy shall be employed on active duty except in time of war: and provided that those officers on the shore

> list and those hereafter retired who were or may be retired * * * on attaining the age of sixty-two years * * * shall, after the passage of this act, be entitled to seventy-five per centum of the present sea pay of the grade or rank *which they held at the time of their retirement.*

Of course the word "retirement" as here used refers to retirement in the legal sense—when the officer passed from the active to the retired list and not to the time when, under a special assignment, he may have ceased to do active duty.

W. H. H. MILLER,
Attorney-General.

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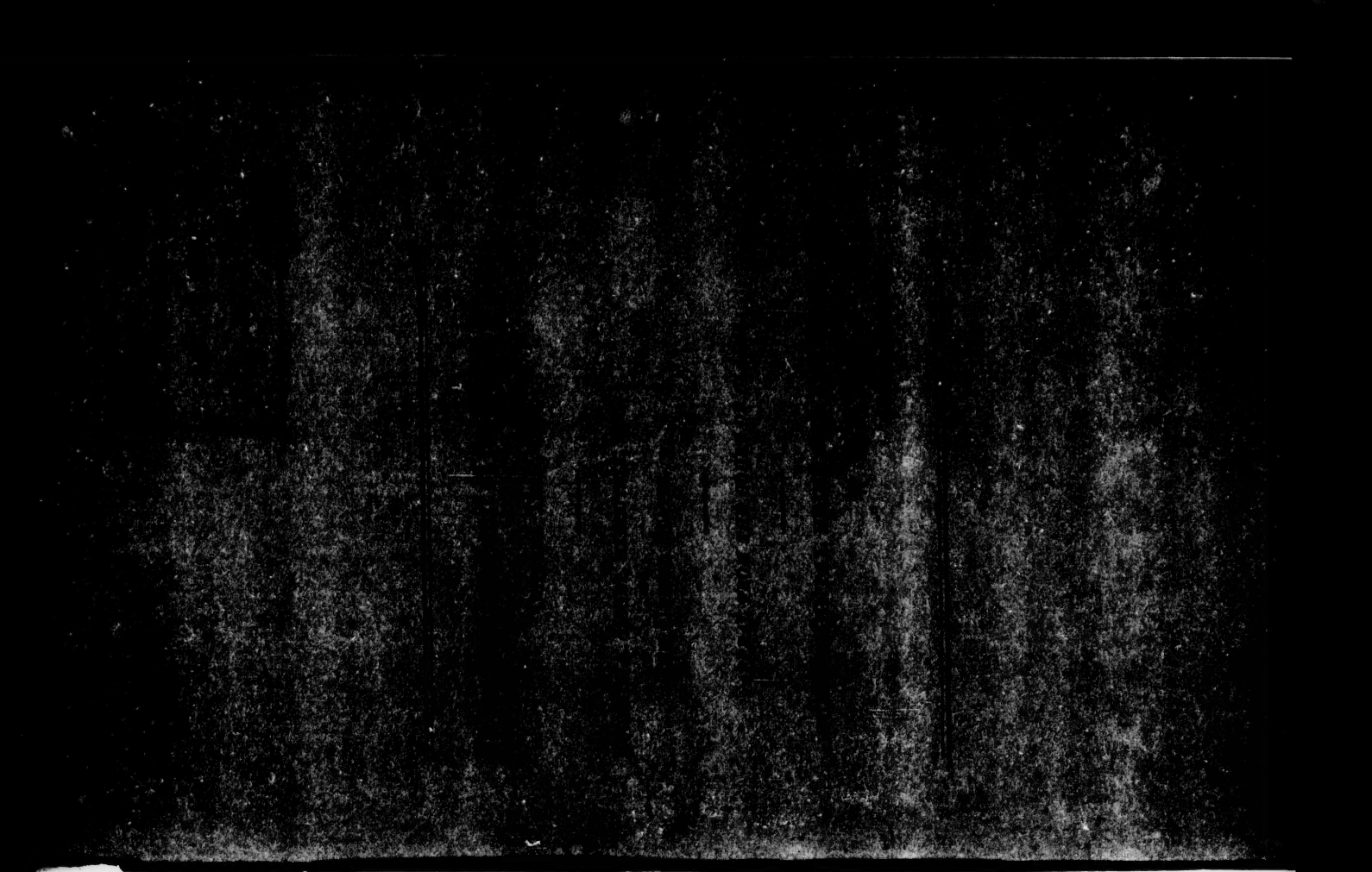

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

EUGENIA A. ROGET, EXECUTRIX, ETC., *vs.* THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Since writing and filing my original brief, the brief on behalf of appellant has been filed, and a more thorough and systematic examination of the statutes applicable to the case has been made by me. Such examination seems to me to relieve the case of difficulty or doubt.

I.

The first statute requiring attention is the act of December 21, 1861 (12 Stats., 329), now, so far as pertinent here, embodied in section 1444, Revised Statutes, which reads as follows:

> When any officer below the rank of vice-admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service.

"The next section" does not touch the case of a professor of mathematics.

Section 2, of the act of 1861, reads as follows:

> That the President of the United States be, and he is hereby, authorized to assign any officer who may be retired under the preceding section of this act to shore duty, and such officer thus assigned shall receive the full shore pay of his grade while so employed.

Section 3 (embodied in Rev. Stat., 1463) provides that, "In time of war the President, by and with the advice and consent of the Senate, may detail officers on the retired list for the command of squadrons and single ships, when he believes that the good of the service requires that they shall be so placed in command;" and further (section 1465, Rev. Stat.) says, that if such detailed officer should receive a vote of thanks of Congress for meritorious service, upon the recommendation of the President, he might be restored to the active list, but not otherwise.

Section 5 provides:

> That all officers retired under the provisions of this act shall receive the retired pay of their respective grades, as fixed by law.

Section 1592, Revised Statutes, reads as follows:

> Officers on the retired list, when on active duty, shall receive the full pay of their respective grades.

It seems to me clear that the word "grade" in Section 1, Section 2, and Section 5 of the act of 1861, is used in precisely the same sense, and that it covers every element that enters into the determination of the rank and pay of the retired officer.

Thus, in Section 1, his name is to be entered on the retired list of officers of the "grade" to which he belonged "at the time of his retirement." In Section 2 he is to have the full shore pay of his "grade" when employed in active duty. And, under Section 5, the retired officer is to receive the pay of his "grade."

In the next place, the detail to shore duty is a special detail; it does not put the officer on the active list or make him eligible to active service generally. He can be assigned to shore duty, but not to sea duty, except as specially provided, or upon waiting orders. His assignment to active service is exceptional, because, in the opinion of the President, exceptional circumstances require it; and, as compensation for such exceptional service, he receives full active-list pay for corresponding duty.

II.

The next act is that of 1870 (16 Stats., 331 and 333; Rev. Stat., sec. 1546, p. 267, and sec. 1588, p. 271).

By section 3, page 331 (Rev. Stat., sec. 1556, p. 267), it is provided that—

> Professors of mathematics, during the first five years after date of appointment, when on duty, shall receive $2,400; on leave or waiting orders, $1,500; during the second five years when on duty, $2,700; on leave or waiting orders, $1,800; during the third five years when on duty, $3,000; on leave or waiting orders, $2,100; after fifteen years when on duty, $3,500; on leave or waiting orders, $2,600.

Section 5 fixes the pay of all officers of the Navy now on, or hereafter placed on, the retired list, when not on active duty, at one-half of the highest pay prescribed by

the act for officers on the active list, whose grade corresponds to the grade *held by such officers respectively at the time of such retirement.* It further provides that no officer heretofore or hereafter promoted upon the retired list shall, in consequence of such promotion, be entitled to any increase of pay. This last provision is embodied in Section 1591, Revised Statutes.

It is thus plain that while officers on the retired list may be promoted (R. S., 1461), it is the will of Congress that their pay shall not thereby be increased, but that it is always to be measured by the pay of the grade in which they were retired. If the pay of that grade remains the same, their pay remains the same; if the pay of that grade is increased, their pay is increased, and not otherwise.

I have been unable to find any provision for measuring the pay of a retired officer by any other standard than the present pay of the grade in which he was retired. And, as before stated, that word "grade" covers all the elements which enter into the question of his pay, namely, his rank, as evidenced by his commission, and his grade as modified or fixed by the length of his service.

III.

We now come to the act of 1873. (17 Stats., 547.)

This act changes the act of 1870 with reference to the matters under consideration only in two particulars:

First. It forbids active service to a retired officer, except in time of war. (R. S., 1462.)

Second. It makes the pay of the retired officer three-fourths instead of one-half the highest pay—that is, sea pay—of his grade. (R. S., 1588.)

I have observed in some discussions of these statutes in former cases a contention by the same counsel representing appellants here that the words "highest pay" in section 5 of the act of 1870 had a different meaning from the words "sea pay" in the act of 1873 (sec. 1588, R. S.), the contention being that in the act of 1870 the words "highest pay" mean the pay attached to the longest service, and it being also contended that the use of the words "sea pay" in the act of 1873 was a mistake. It seems to me entirely clear that the words "highest pay" and "sea pay" mean exactly the same thing.

There are for the officers in the Navy generally three rates of pay: sea pay, shore pay, and the pay on leave or waiting orders. Sea pay is the highest. And it was with reference to the rates of pay thus distinguished that both of these statutes were enacted, and not with reference to the rates of pay graduated upon the length of service.

For professors of mathematics there are but two rates of pay, there being no distinction between sea pay and shore pay. There is one rate on duty, and one rate when on leave or waiting orders.

The appellant's testator received in his lifetime the full retired pay of an officer of the grade in which he stood at the date of his retirement, namely, three-fourths of $2,400 per year.

IV.

Such being the status of appellant's testator, what change was effected by the passage of the act of 1883?

His pay could be increased in two ways:

First. By a statute directly increasing the rate of pay of a retired officer; or,

Second. By a statute increasing the present pay of officers on the active list in his grade when he retired.

It is not, however, claimed that any such act was passed. It is not pretended that the act of 1883 directly, or in terms, increased the pay of retired officers, nor that it increased the "present active pay" of the grade in which he retired.

The claim seems to be that, by doing active duty after retirement, Prof. Roget entitled himself to be considered as retired, not in his first, but in his second, five years of service; a claim, as it seems to me, wholly baseless.

The act of 1883 (22 Stats., 473) reads as follows:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officers since last entering the service.

There is here no word indicating a purpose to make a new rule for officers on the retired list or in anyway to enlarge their pay.

This act enlarges the pay of an officer on the active list by changing his grade; that is, by giving him credit for all past service, it lifts him from the grade of the first five years to that of the second five years, etc., and thus,

by an elevation of his grade, increases his pay. It does not do the one thing that could increase the pay of a retired officer, namely, "increase the pay of the grade corresponding to that held by him at the time of such retirement." The pay of the particular grade remains the same.

By giving the officer on the active list the benefit of past service it lifts him from one grade to another, and the higher grade calls for increased pay. But there is no provision for lifting a retired officer from one grade to another. His status, so far as pay is concerned, remains fixed in that grade in which he was retired, and he is entitled to, and can get, only three-fourths of the pay of that grade.

This is in harmony with the provisions, heretofore cited, forbidding increase of pay by promotion of a retired officer. Why should the pay of a retired officer be increased? His retired pay is in the nature of a pension. He is retired because of his supposed incapacity for further useful service. If he is detailed for active service at all, such detail is exceptional, and he is given full pay for such active service.

In *United States* vs. *Thornley* (18 C. Cls. R., 117) the court below said:

> The whole basis of longevity pay is the officer's capacity for duty and his performance of it; in other words, longevity pay is for longevity in *actual service*.

This passage is quoted in appellant's brief in this case, and yet their whole case goes upon directly the opposite theory.

Section 1556 giving longevity pay applies only to officers on the active list. They only have longevity pay. Retired officers are not given longevity benefits at all.

The conclusions reached in the foregoing analysis of the statutes are supported by the opinion of Chief Justice Drake in the case of *Thornley* vs. *The United States* (*supra*), affirmed in *Thornley* vs. *United States* (113 U. S., p. 310), and are, it seems to me, decisive of this case.

W. H. H. MILLER,
Attorney-General.

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148 U.S. 172

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1289.~~ ~~889~~ ~~446~~ 123

E. MARX, PLAINTIFF IN ERROR,

vs.

IDA J. HANTHORN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 4, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1289.

E. MARX, PLAINTIFF IN ERROR,

vs.

IDA J. HANTHORN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 In the Supreme Court of the United States.

E. MARX
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant. } No. 1260. Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between E. Marx, plaintiff and plaintiff in error, and Ida J. Hanthorn, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this March 9, 1889.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,

By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. E. Marx *vs.* Ida J. Hanthorn. Writ of error. Filed ——, 188–. —— ——, clerk, by —— ——, deputy clerk.

2 In the Supreme Court of the United States.

E. MARX
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant. } No. 1260. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between E. Marx, plaintiff and plaintiff in error, and Ida J. Hanthorn, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this March 9, 1889.

[SEAL.] R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. E. Marx *vs.* Ida J. Hanthorn. Writ of error. Filed ——, 188–. ——, clerk, by ——, deputy clerk.

3 UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To Ida J. Hanthorn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-

nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein E. Marx is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this March 9, 1889.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] 1260. U. S. circuit court, district of Oregon. E. Marx *vs.* Ida J. Hanthorn. Citation on writ of error. Filed Mar. 13, 1889. R. H. Lamson, clerk.

Due and legal personal service is hereby admitted of the within citation on us, the attorneys of record for the within-named defendant in error, Ida J. Hanthorn; said service made upon us at Portland, Oregon, this 13th day of March, 1889.

GEO. H. DURHAM,
F. A. E. STARR,
Attorneys of Record for the Within-Named Defendant in Error, Ida J. Hanthorn.

4 UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

To Ida J. Hanthorn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein E. Marx is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this March 9, 1889.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: No. 1260. U. S. circuit court, district of Oregon. E. Marx *vs.* Ida J. Hanthorn. Citation on writ of error. Filed Mar. 13, 1889. R. H. Lamson, clerk.

Due and legal personal service is hereby admitted of the within citation on us, the attorneys of record for the within-named defendant in error, Ida J. Hanthorn; said service made upon us at Portland, Oregon, this 13th day of March, 1889.

GEO. H. DURHAM,
F. A. E. STARR,
Attorneys of Record for the Within-Named Defendant in Error, Ida J. Hanthorn.

5 In the Circuit Court of the United States for the District of Oregon. April Term, 1886.

Be it remembered that on the 3rd day of August, 1886, there was duly filed in the circuit court of the United States for the district of Oregon a complaint in words and figures as follows, to wit:

6 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
B. CAMPBELL, Defendant.

The plaintiff alleges—

That he is a subject and citizen of Germany.

That the defendant is a citizen of the State of Oregon.

That the plaintiff is the owner in fee and entitled to the immediate possession of lots three and four, in block "E," in the city of Portland, Multnomah county, Oregon.

That the defendant wrongfully withholds said property and the possession thereof from the plaintiff, to his damage in the sum of one hundred dollars.

That said property exceeds in value the sum of $500.00.

Plaintiff therefore asks judgment against defendant for—

1st.

The possession of said property.

7 2d.

For one hundred dollars damages.

3d.

For costs and disbursements herein.

W. SCOTT BEEBE,
Plaintiff's Attorney.

STATE OF OREGON, *Multnomah County,* } *ss:*

I, E. Marx, being first duly sworn, say I am the plaintiff herein and that the foregoing complaint is true, as I verily believe.

EMIL MARX.

Subscribed and sworn to before me this Aug. 3rd, 1886.

R. H. LAMSON, *Clerk.*

Endorsed: Filed Aug. 3, 1886. R. H. Lamson, clerk.

8 And afterwards, to wit, on the 3rd day of August, 1886, there was issued out of said court a summons in words and figures as follows, to wit:

9 DISTRICT OF OREGON, *ss:*

I certify that on the 9th day of August, 1886, at Portland, Multnomah county, in said district, I duly served the within summons upon the therein-named B. Campbell by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by pl'ff's att'y.

PENUMBRA KELLY,
United States Marshal,
By P. A. MARQUAM, JR., *Deputy.*

10 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

E. MARX
vs.
B. CAMPBELL. } No. 1260. Summons.

The President of the United States to B. Campbell, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the possession of the real property described in the complaint herein, for the sum of $100.00 damages, and for the costs and disbursements of this action.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Seal United States Circuit Court, Oregon.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 3d day of Aug., 1886.

R. H. LAMSON, *Clerk.*

Endorsed: No. 1260. In the circuit court of the United States for the district of Oregon. E. Marx *vs.* B. Campbell. Summons. Returned and filed Aug. 9, 1886. R. H. Lamson, clerk.

11 And afterwards, to wit, on the 11th day of August, 1886, there was duly filed in said court an answer of tenant in words and figures as follows, to wit:

12 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
B. CAMPBELL, Defendant. } Answer.

The defendant, answering the complaint herein filed against him, avers that he is in possession of the demanded premises as the tenant of Ida J. Hanthorne, and not otherwise; that said Ida J. Hanthorne resides and now is at Astoria, Clatsop county, State and district of Oregon.

Wherefore he prays to be hence dismissed.

B. KILLIN,
GEO. H. DURHAM,
F. A. E. STARR,
Attorneys for Defendant.

DISTRICT OF OREGON, *ss:*

I, B. Campbell, the above-named defendant, being first duly sworn, say that the foregoing answer is true, as I verily believe.

B. CAMPBELL.

Subscribed and sworn to before me this 10th day of August, 1886.

[SEAL.] R. G. MORROW,
Notary Public for Oregon.

13 STATE OF OREGON,
County of Multnomah, } *ss:*

Due service of the within answer is hereby accepted, at Portland, Oregon, this — day of August, 1886, by receiving a copy thereof, duly certified to as such, by Geo. H. Durham, of counsel for def't.

W. SCOTT BEEBE,
Attorneys for Plaintiff.

Endorsed: Filed Aug. 11, 1886. R. H. Lamson, clerk.

14 And afterwards, to wit, on the 11th day of August, 1886, there was duly filed in said court a stipulation in words and figures as follows, to wit:

15 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Pl'ff,
vs.
B. CAMPBELL, Def't. } No. 1260.

The defendant herein having answered that he was in possession of the demanded premises as tenant only, and not otherwise, of one

Ida J. Hanthorne, who resides at Astoria, Clatsop county, Oregon, it is hereby stipulated and agreed that said Ida J. Hanthorne may be made a party defendant herein without any formal or written application therefor, and that an order so making her defendant herein may be entered up at once, and that said Hanthorne may have ten days from the date of said order within which to plead to said complaint.

GEO. H. DURHAM,
Of Att'ys for Def't-, B. Campbell & Ida J. Hanthorne.
W. SCOTT BEEBE,
Attorney for Plaintiff.

Endorsed: Filed Aug. 11, 1886. R. H. Lamson, clerk.

16 And afterwards, to wit, on Wednesday, the 11th day of August, 1886, the same being the 55th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

17 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
B. CAMPBELL. } No. 1260.

AUGUST 11, 1886.

Now, at this day, comes the plaintiff, by Mr. W. S. Beebe, of counsel, and the defendant, by Mr. George H. Durham, of counsel, and said defendant shows to the court by his answer duly filed herein that he is in possession of the lands described in plaintiff's complaint only as the tenant of Ida J. Hanthorn, and prays that said Ida J. Hanthorn be substituted as defendant herein; whereupon, on motion of Mr. George H. Durham, of counsel for said Ida J. Hanthorn, and upon the stipulation of the parties filed herein, it is ordered that said defendant, B. Campbell, go hence without day, and that said Ida J. Hanthorn be, and she is hereby, substituted as defendant herein.

18 And afterwards, to wit, on the 17th day of August, 1886, there was duly filed in said court an answer in words and figures as follows, to wit:

19 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Defendant (Substituted for B. Campbell). } Answer of Hanthorn.

This defendant, answering the complaint herein filed, denies that

the plaintiff is the owner in fee or of any estate, right, title, or interest in or to lots three and four, in block "E," in the city of Portland, in Multnomah county, State of Oregon, or of any part thereof or of either of them.

Denies that she wrongfully withholds said property or any part of it or the possession thereof or any part of it from plaintiff.

Denies that plaintiff is damaged in the sum of $100 or any sum by said withholding or otherwise.

2. And for another and separate defense defendant alleges that she is the owner in fee simple of and entitled to the possession
20 of a parcel of land in the city of Portland, in Multnomah county, State of Oregon, which is particularly described as follows:

All that certain tract or lot of land situate, lying, and being in the city of Portland, in Multnomah county and State of Oregon, and bounded as follows: Commencing at a point in the west line of Tenth street 100 feet from the south line of Main street and running thence westerly and parallel with Main street 100 feet; thence southerly and parallel with Tenth street 130 feet; thence easterly and parallel with said Main street 100 feet; thence northerly to the place of beginning 130 feet.

Defendant avers that plaintiff claims that the description in the complaint covers defendant's said lands and that the lands are known as lots 3 & 4, in block "E," in said city of Portland, which defendant denies, but if it shall be shown that the lands are known by the latter description she desires to make the defense of owner-
21 ship in herself, and for that reason makes the allegation of ownership above set out.

Wherefore defendant prays judgment that she is the owner of the said lands and for her costs and disbursements herein.

B. KILLIN,
GEO. H. DURHAM, AND
F. A. E. STARR,
Attorneys for Def't.

DISTRICT OF OREGON, } *ss:*
Clatsop County, }

I, Ida J. Hanthorn, the defendant herein, being duly sworn, say that the foregoing answer is true as I verily believe.

IDA J. HANTHORN. [SEAL.]

Subscribed and sworn to before me this 14 day of August, 1886.

[SEAL.]

A. F. JOHNS,
Notary Public for Oregon.

DISTRICT OF OREGON, *ss:*

I, R. G. Morrow, being duly sworn, say that I served the within answer on W. S. Beebe, att'y for pl'ff herein, this 17th day of

August, 1886, by leaving a copy thereof, duly certified to as
22 such by G. H. Durham, of att'ys for def't, in the office of said Beebe, in Portland, Oregon, at 11 a. m. of said day, with Geo. W. Yocum, Esq., then in charge of said office, the said Beebe being out of said city at said time.

R. G. MORROW.

Subscribed and sworn to before me this Aug. 17, 1886.
[SEAL.] GEO. H. DURHAM,
Notary Public for Oregon.

Endorsed: Filed Aug. 17, 1886. R. H. Lamson, clerk.

23 And afterwards, to wit, on the 21st day of August, 1886, there was duly filed in said court a demurrer in words and figures as follows, to wit:

24 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant.

Now comes E. Marx, the plaintiff, by his attorneys, and demurs to all of defendant's second and separate answer containing new matter for the reason that said new matter does not constitute a defense to this action.

August 21, 1886.

W. SCOTT BEEBE,
J. W. WHALLEY,
Att'ys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 21 day of August, 1886, by receiving a copy thereof duly certified to as such by W. Scott Beebe, counsel for plaintiff.

GEO. H. DURHAM,
Attorney for Defendant.

Endorsed: Filed Aug. 21, 1886. R. H. Lamson, clerk.

25 And afterwards, to wit, on Wednesday, the 8th day of Sept., 1886, the same being the 69th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

26 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN, Substituted for B. Campbell. } No. 1260.

SEPTEMBER 8, 1886.

Now, at this day, this cause comes on to be heard upon the demurrer to the answer and was argued by Mr. John W. Whalley and Mr. W. Scott Beebe, of counsel for the plaintiff, and by Mr. George H. Durham, of counsel for the defendant; on consideration whereof it is ordered that said demurrer be, and the same is hereby, sustained, with leave to said defendant to amend her answer within fifteen days herefrom.

27 And afterwards, to wit, on the 14th day of September, 1886, there was duly filed in said court an amended answer in words and figures as follows, to wit:

28 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN (Substituted for B. Campbell), Defendant. } No. 1260. Amended Answer of Hanthorn.

This defendant, for an amended answer to the complaint filed herein by leave of court, denies that the plaintiff is the owner in fee or otherwise of lots three and four, in block "E," in the city of Portland, in Multnomah county, State of Oregon, or of any part thereof or of either of them or of any estate, right, title, or interest in or to said lots or either of them; denies that she wrongfully withholds said property or any part of it or the possession thereof or any part of it from plaintiff.

Denies that plaintiff is damaged in the sum of $100 or any sum by said or any withholding or otherwise or at all.

2. And, for another and separate defense, defendant alleges—

That she is the owner in fee simple and entitled to the possession of a parcel of land situate, lying, and being in the city of Portland, in Multnomah county and State of Oregon, and bounded as follows:

Beginning at a point in the west line of Tenth street 100 feet from the south line of Main street, and running thence westerly and parallel with said Main street 100 feet; thence southerly and parallel with Tenth street 130 feet; thence easterly and parallel with said Main street 100 feet; thence northerly along the west line of said Tenth street 130 feet to the place of beginning.

29 And the defendant avers that said last-described lands are the same lands claimed herein by the plaintiff and described

in his complaint as lots 3 and 4, in block "E," in the city of Portland, Multnomah county, Oregon.

Wherefore defendant prays judgment that she is the owner of the said lands in her amended answer herein described and for her costs and disbursements herein.

B. KILLIN,
GEO. H. DURHAM, AND
F. A. E. STARR,
Defendant's Attorneys.

STATE OF OREGON, }
Clatsop County, District of Oregon, } *ss:*

I, Ida J. Hanthorn, the defendant herein, being duly sworn, say that the foregoing amended answer is true, as I verily believe.

IDA J. HANTHORN.

Subscribed and sworn to before me this 10th day of September, 1886.

[SEAL.] J. O. BOZORTH.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within answer is hereby accepted, at Portland, Oregon, this — day of September, 1886, by receiving a copy thereof duly certified to as such by Geo. H. Durham, of counsel for def't.

W. SCOTT BEEBE,
Attorney for Pl'ff.

Endorsed: Filed Sept. 14, 1886. R. H. Lamson, clerk.

30 And afterwards, to wit, on the 18th day of Sept., 1886, there was duly filed in said court a reply in words and figures as follows, to wit:

31 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant. }

The plaintiff herein, replying to defendant's answer, denies that defendant is the owner in fee or otherwise of the lands described by metes and bounds in defendant's first separate defense in said answer or of any part thereof, or is entitled to the possession of the same or any portion thereof. Plaintiff admits that the lands described in plaintiff's complaint as lots 3 and 4, in block "E," are included in the lands described by metes and bounds in defendant's answer, and to that extent are the same lands as are therein described.

W. SCOTT BEEBE AND J. W. WHALLEY,
Plaintiff's Attorneys.

DISTRICT OF OREGON, } ss:
Multnomah County, }

I, E. Marx, being duly sworn, say I am the plaintiff herein, and that the foregoing reply is true, as I verily believe.

EMIL MARX.

Subscribed and sworn to before me Sept. 17, 1886.

W. SCOTT BEEBE,
[SEAL.] *Notary Public for Oregon.*

PORTLAND, OR., *Sept.* 17, 1886.

I hereby admit due service on me of a duly certified copy of the within reply, at Portland, Oregon.

B. KILLIN & F. A. E. STARR,
By H. W. HOGUE,
Att'ys for Def't.

Endorsed: Filed Sept. 18, 1886. R. H. Lamson, clerk.

32 And afterwards, to wit, on Tuesday, the 12 day of Oct., 1886, the same being the 7th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge presiding—the following proceedings were had in said case, to wit:

33 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN, Substituted for B. Campbell. } No. 1260.

OCTOBER 12, 1886.

Now, at this day, comes the plaintiff, by Mr. W. S. Beebe, of counsel, and the defendant, by Mr. Geo. H. Durham, of counsel, and, on motion of said plaintiff, it is ordered that this cause be, and the same is hereby, set for trial by the court without the intervention of a jury and in accordance with the stipulation of the parties filed herein on Friday, October 22, 1886.

34 And afterwards, to wit, on the 20th day of Oct., 1886, there was duly filed in said court a stipulation in words and figures as follows, to wit:

35 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN (Substituted for B. Campbell), Defendant. } No. 1260.

Stipulation.

I.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the above-entitled cause may be tried by the court without the intervention of a jury, which is hereby expressly waived.

II.

It is further stipulated that the defendant was the owner in fee of the demanded premises at the time of the alleged assessment, levy, and sale of the same for taxes of the year 1883, and that she has not conveyed the same, unless, by operation of law, said property has been duly conveyed by tax proceedings under which the plaintiff claims, and that the said property is worth $6,000.00.

W. SCOTT BEEBE,
Of Plaintiff's Attorney.
KILLIN & STAR &
GEO. H. DURHAM,
Defendant's Attorneys.

Endorsed: Filed Oct. 20, 1886. R. H. Lamson, clerk.

36 And afterwards, to wit, on the 20th day of April, 1887, there was duly filed in said court the findings of the court in words and figures as follows, to wit:

37 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant. } No. 1260.

APRIL 20, 1887.

In accordance with the stipulation of the parties filed herein, this cause was tried by the court without the intervention of a jury, Mr. W. S. Beebe and Mr. John W. Whalley appearing of counsel for the plaintiff, and Mr. George H. Durham and Mr. F. A. E. Starr ap-

pearing of counsel for the defendant; on consideration whereof the court now finds and states the following conclusions of fact:

1. That at and before the commencement of this action the plaintiff was not the owner of the real property described in the complaint herein as lots three and four, in block "E," in the city of Portland, Oregon, and is not entitled to the possession thereof.

2. That at and before the commencement of this action the defendant, Ida J. Hanthorn, was the owner of said real property and entitled to the possession thereof.

And as a conclusion of law from the foregoing the court finds that said defendant is entitled to a judgment that she go hence without day, and that she have and recover of and from the plaintiff her costs and disbursements herein taxed at —.

(Signed) DEADY, *J.*

Endorsed: Filed April 20, 1887. R. H. Lamson, clerk.

38 And afterwards, to wit, on the 22d day of April, 1887, there was duly filed in said court an opinion of court in words and figures as follows, to wit:

39 U. S. Circuit Court, District of Oregon.

WEDNESDAY, *April* 20, 1887.

E. MARX
v.
IDA J. HANTHORN. } No. 1260.

Action to recover possession of real property.

(1.) Tax deed.—The sheriff in office is the proper person to make a deed to property sold for delinquent taxes on the failure of the owner to redeem the same.

(2.) Deputy sheriff.—A deputy sheriff may execute a deed to property sold for delinquent taxes, and, when he does so, he should execute and acknowledge the same for and in the name of his principal.

(3.) Tax deed as evidence.—The Legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings, so far as they rest in the discretion of the Legislature, and an omission to perform them may subsequently be cured or excused by it; but it cannot make such deed more than *prima facie* evidence of the performance of any act or the existence of any fact essential to the validity of the transaction; and to do so would be to deprive the party of his property without due process of law, contrary to the fourteenth amendment.

(4.) Notice of sale for delinquent taxes.—Reasonable notice of the sale of real property for delinquent taxes is an essential part of the proceedings to deprive the owner of his title thereto, and the Legislature cannot make the tax deed conclusive evidence

of the fact that the same was duly given; and the name of the owner, when known and entered on the assessment-roll, is a material part of such notice.

(5.) Contract of the State with purchaser at tax sale.—Where a person purchases real property at a sale for delinquent taxes under a statute which makes the tax deed conclusive evidence of the regularity of the prior proceedings, with certain exceptions, the Legislature, as to any fact or matter of which it had the power to make the deed conclusive evidence, cannot thereafter make the same only *prima facie* evidence thereof without impairing the obligation of the contract of the State with the purchaser of the property.

(6.) Case in judgment.—Lots 3 and 4, in block E, in Portland, were assessed for taxation to the owner, Ida F. Hanthorn, and so transcribed onto the tax-roll, on which the taxes then levied on the property were extended. The taxes were returned delinquent and the property entered on the delinquent tax-roll as that of Ida J. Hanthorn, and in due time so advertised and sold and a certificate of the sale given to the purchaser. The property not being redeemed at the expiration of two years, the sheriff made a deed thereof to the purchaser, in which the prior proceedings were represented as having been had and done concerning the property of Ida F. Hanthorn. The grantee of the purchaser afterwards brought an action against Hanthorn to recover the possession of the premises: Held that the defendant, notwithstanding the statute in force at the date of the sale and deed, making the latter conclusive evidence of the regularity of the prior proceeding as to the notice of the sale, might show that the property was advertised and sold as that of Hawthorn instead of Hanthorn, and thereby avoid the deed.

DEADY, *J.*:

This action is brought by the plaintiff, a subject of the Emperor of Germany, against the defendant, a citizen of Oregon, to recover the possession of lots 3 and 4, in block E, in the town of Portland.

The action was originally brought against B. Campbell, the party in possession, who, having answered that he was in possession as the tenant of Ida J. Hanthorn, the latter was substituted for him as defendant.

It is alleged in the complaint that the plaintiff is the owner of the premises, and that the defendant wrongfully withholds from him the possession thereof.

The answer contains a denial of the allegations of the complaint and a plea of title in the defendant, with a right to the possession, and the replication denies the plea.

The defendant claims the premises under a deed of August 28, 1878, from W. W. Chapman and Margaret F., his wife, the latter being the patentee of the United States under the donation act of 1850 of a tract of land including said block E. The plaintiff claims under two deeds, one from ex-Sheriff Sears of July 29, and the other

from Sheriff Jordan of July 30, 1886, each purporting to be made in pursuance of a sale of the property for taxes by the former on June 30, 1884.

By a stipulation filed in the cause it is admitted that the defendant was the owner in fee of the premises at the time of the assessment and sale of the same for taxes, and that she is still such owner, unless such sale and the conveyance thereon had the effect to pass the title to the purchaser thereat, and that the property is worth $6,000.

The case was tried by the court without the intervention of a jury, and on the trial the proceedings, constituting the assessment, levy of taxes, and the sale of the property and the conveyance thereon, were received in evidence, subject to objection for want of competency and materiality.

From these it appears that on August 27, 1883, the premises were listed by the assessor of Multnomah county on the assessment-roll thereof for taxation in that year as the property of Ida F. Hanthorn, and valued at $2,200; that on October 17, 1883, the entry on the assessment-roll concerning said property was transcribed onto the tax-roll of said county by the clerk thereof, and on the same day the taxes for school, State, and county purposes, amounting to $34.32, were levied on said property and extended on said tax-roll by the county court of said county, and the sheriff thereof commanded, by a warrant endorsed thereon, signed by the county clerk and sealed with the seal of said court, to collect said taxes by demanding payment of the same and making sale of the goods and chattels of the persons charged therewith; that the sheriff, George C. Sears, to whom said warrant was directed, having returned that the tax levied on said property was unpaid and delinquent, the latter was, on April 22, 1884, entered on the delinquent tax-roll of said county by the clerk thereof as the property of Ida F. Hawthorn, and a warrant endorsed thereon, signed by said clerk and sealed with the seal of said county, commanding said sheriff to levy on the goods of the delinquent tax-payer, and in default thereof on the real property mentioned in said tax-list, or sufficient thereof to satisfy said taxes, charges, and expenses; that afterward said sheriff returned that he received said delinquent tax-list and warrant on April 22, 1884, and, in pursuance thereof and in default of personal property, he levied on said lots three and four and advertised and sold the same on June 18, 1884, as the property of Ida F. Hawthorn, to J. E. Bennett for $37.51, the amount of said delinquent tax and costs and expenses thereon; that on July 29, 1886, George C. Sears, as ex-sheriff of said Multnomah county, executed and delivered to said Bennett a deed for the premises, in which the proceedings concerning the assessment of said property, the levy of the taxes thereon, the non-payment and delinquency of the same, and the sale of the property therefor were substantially recited, except that it does not thereby appear that the premises were entered on the delinquent tax-list or advertised or sold as the property of Ida F. Hawthorn, but as that of Ida F. Hanthorn; that on July 30, 1886, Thomas A. Jordan, as sheriff of said Multnomah county, by A. W. Witherell, deputy, exe-

cuted and delivered to said Bennett a deed of the premises, containing the same recitals as the one from Sears. Each deed was acknowledged on the day of its execution and afterwards admitted to record. The original Jordan deed was put in evidence and also a certified copy of the record; but the execution of the original was not otherwise proved, and it is contended that the acknowledgment is not legal, and therefore it cannot be read in evidence without direct proof of its execution.

On July 31, 1886, Bennett and his wife, Alvira F., in consideration of $500, as recited in the deed, quitclaimed the premises to the plaintiff.

The deed by Sears, the ex-sheriff, is unauthorized and void. When he made the sale and gave the certificate thereof to the purchaser and returned his proceedings in that respect to the clerk of the county court the process under which he acted was fully executed. A sheriff who sells real property on a warrant for the collection of delinquent taxes is not thereby authorized or required to make a formal conveyance thereof to the purchaser, but only to deliver him a certificate to the fact of such sale. If the land is redeemed within two years thereafter the effect of the sale ceases, and no further official action is required in the premises; but in case no redemption is had within that time the statute (Or. Laws, p. 767, § 90) directs that "the sheriff" shall execute a conveyance to the purchaser or his assigns. This command is addressed to the "sheriff" then being, and not to any ex-sheriff who may have made the sale two years before. The conveyance itself is in the nature of a further assurance given by the State in evidence of the fact that a sale of property, which was only conditional when made, has, by the lapse of time and the omission of the former owner, become absolute; and the judge or the clerk of the county court might, with equal propriety, have been designated as the person to execute the same.

Nor is it material, in this connection, that an outgoing sheriff is required (Code of C. P., § 986) to "complete the execution of all final process which he has begun to execute," and that a warrant for the collection of delinquent taxes is "deemed an execution against property * * * and shall be executed and returned in like manner," except as otherwise provided (Or. Laws, p. 766, § 82), for both a warrant and an execution are fully executed when a sale is made thereon and a certificate thereof given to the purchaser. The process is then returnable, and nothing more is done on or in pursuance of it. In this State the sale of property on an execution for the enforcement of a judgment is conditional, not only on redemption by the debtor or any lien creditor, but on the confirmation thereof by the court. Code of C. P., §§ 293–301.

The proceedings subsequent to the sale and the return of the process, whether for the enforcement of a judgment or the collection of delinquent taxes, including the deed to the purchaser or
40 redemptioner, are taken in pursuance of the statute in such cases made and provided, and not the process, and are conducted and performed before or by the sheriff then in office.

The supreme court of this State, in Moore *v.* Wallamet T. & L.

Co. (1 Or., 369), held that the sheriff in office is the proper person to make the deed in pursuance of a sale on execution. "Such a construction of the statute," says Judge Boise, speaking for the court, "will establish a rule most convenient to the parties, for the sheriff in office can always be found, as his official duties require his presence in the country, while the former sheriff may die, be disqualified, or remove from the country, and render proceedings before him impracticable."

Although this decision was made in 1879, no notice is taken by the court of the amendment to said section 986 of the code by the act of October 21, 1878 (Ses. L., 99), which adds a proviso to the effect that when real property is sold under execution and the sheriff making the sale fails to make a proper deed to the purchaser during his term of office, the court confirming the sale may order the sheriff in office to make such deed, which shall have the same effect as if made by the sheriff who made the sale. In the argument of counsel for appellant, as reported (p. 363), this amendment is referred to as plainly evidencing that the Legislative Assembly recognized the law to be such that the sheriff who made the sale must make the deed, and such appears to be the effect of the amendment, except in the cases therein provided for, wherein the court may order the sheriff in office to make the deed. But it is probable, though the fact cannot be definitely ascertained from the report of the case, that the deed in question was made by the sheriff in office before section 986 was amended, and therefore the court treated the amendment as so far non-existent.

But, in my judgment, section 986, in neither its original or amended form, has any or was ever intended to have any application to a warrant for the collection of delinquent taxes. Indeed, the amendment plainly limits the operation of the section to sales on execution for the enforcement of judgments, by the fact that the power to make the order therein provided for, directing a sheriff in office to make a deed, is limited to the court which confirmed the sale—a proceeding unknown to a sale for delinquent taxes.

P operty sold for delinquent taxes may be redeemed in two years from the date of the certificate of sale—a period equal to a sheriff's term of office. Therefore the redemption must occur after the expiration of the term of the sheriff who made the sale. The redemption is a private act which takes place between the parties by the payment to the purchaser of the purchase-money and a certain per centum thereon in addition. If no redemption is made within the time prescribed, on the application of the party entitled thereto, the statute directs "the sheriff"—not the ex-sheriff or the person who made the sale, but the sheriff then being — to make the deed accordingly.

It is objected to that the writing purporting to be the deed of Jordan, the sheriff in office, it is not proven.

Section 22 of the act relating to conveyances (Or. Laws, 518) provides that a conveyance acknowledged as therein prescribed "may be read in evidence without further proof thereof," and shall be admitted to record, and by section 27 of the same act (Or. Laws, 518) a

certified transcript of such record "may be read in evidence * * * with the like force and effect as the original."

The deed is executed in the name of "Thos. A. Jordan, sheriff of Multnomah county, Oregon, and tax collector of said county, by A. W. Witherell, deputy." It was acknowledged before the county clerk, and the certificate states that personally appeared before said clerk "the within-named Thos. A. Jordan, by A. W. Witherell, deputy sheriff" of the county of Multnomah, Oregon, and acknowledged the execution of the deed.

By sections 962 and 983 of the Code of C. P. it is provided that "a sheriff may have a deputy," who "has the power to perform any act or duty that his principal has."

A deputy is an agent, and when he performs any act within the scope of his agency or deputyship he should do so in the name of his principal. In the nature of things a deed can only be acknowledged by the person who actually signed or executed it; consequently a deed executed by an agent or deputy must be acknowledged by him. But in so doing he acts for his principal the same as in the signing or execution of the writing, and therefore he must make the acknowledgment in the name of and for the principal. See Huey *v.* Van Wie, 23 Wis., 617; 2 Wash. R. P., 573; 1 Jones on Mort., § § 130, 533; Freeman on Ex., § 327.

The original deed being properly executed and acknowledged proves itself, and the transcript from the record thereof does the same.

The effect of the deed remains to be considered.

By § 5 of the act of December 18, 1865 (Or. Laws, 767, § 90), it is declared that such a deed "shall operate to convey a legal and equitable title to the purchaser sold in fee simple to the grantee named in the deed," whatever that means; but the section also provides that on the delivery of said deed "all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes and the sale of the property shall be presumed regular and to have been had and done in accordance with law, and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided except by proof of either (1) fraud in the assessment or collection of the tax; (2) payment of the tax before sale or redemption after the sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed on the property sold."

It appears from the delinquent tax-roll that this property belonged to Ida J. Hawthorn, and from the return of the sheriff it appears that it was so advertised and sold, while the fact is it belonged to Ida F. Hanthorn, and was so assessed, except that "J" was used as the initial of the middle name instead of "F."

The deed recites that the sale was made in pursuance of a warrant to the sheriff to collect the delinquent taxes of Ida F. Hanthorne by the sale of her goods and chattels, and, in default thereof, by the sale of the lots in controversy, describing them; that the notice of the

sale was duly given and a certificate thereo f given to the purchaser but the name of the owner in the notice must have been the same as that on the delinquent tax-roll, Ida J. Hawthorn, from which it was made, and the return of the sheriff so states. The certificate of sale is not produced. Presumably it was delivered to the sheriff by the purchaser when he obtained his deed. It is not filed with the proceedings, but the name of the owner, as stated therein, must be the same as in the delinquent tax-roll and notice.

How the name came to be Ida F. Hanthorne in the sheriff's deed instead of Ida J. Hawthorn, as in the delinquent tax-list, notice, and certificate of sale, is a question not now necessary to consider, except that it does not appear to have been legally done. If the plaintiff shall be injured or lose her property thereby the parties to the transaction may be liable under § 109 (Or. Laws, 771) for double damages and costs of suit. To deliberately declare or recite in a deed that certain property was sold for taxes as the property of one person, when in fact it was advertised and sold as that of another, so as to make the deed conform to the assessment and the actual ownership of the property, and thereby preclude the owner from showing the truth thereabout, may prove to be a "fraudulent act" within the statute, for which a sheriff and his bondsmen would be liable.

On these facts the question arises, Is a tax deed conclusive evidence under the statute of title in the grantee to the premises therein granted, notwithstanding it appears from the prior proceedings that the property was advertised and sold not as the property of the owner to whom it was assessed, but as that of another?

Land occupied must be assessed in the name of the owner or occupant, but unoccupied land, if the owner is unknown, may be assessed without naming any owner. Or. Laws, 750, § 7; 755, § 35. This property was assessed to the owner and presumably was occupied. It appears to have been assessed to Ida F. Hanthorn and the taxes regularly paid by her from 1878 to 1882, inclusive.

The delinquent tax-roll on which the sale of property is made must contain the description thereof found in the assessment and tax-rolls and the name of the person taxed therefor if therein specified. Or. Laws, 764, § 76, 77. And generally the statute relating to taxation provides or plainly indicates that when the owner of property is known it must be assessed in his name or that of the occupant, if there be one, and that such name becomes and is a part of the description of the premises, and as such should be carried through all the subsequent proceedings, and particularly the notice and certificate of sale.

I am unable to say that the change of the name of the person taxed in the proceedings subsequent to the tax-roll and prior to the execution of the deed brings the case within either of the four grounds specified in the statute on which the deed may be avoided. If either it must be the first one—"fraud in the assessment or collection of the tax." Now, fraud is not to be inferred from an act which on any reasonable hypothesis may have been innocently done. The change in the name may have and most likely did occur through

mistake resulting from carelessness and without any wrongful purpose or intent.

In Kelly *v.* Herrel, 10 Saw., 169, I held that this statute, in making a tax deed conclusive evidence of the title of the grantee, except in the four particulars mentioned, goes in some respects beyond the power of the Legislature.

41

Following the ruling in McCready *v.* Sexton, 29 Iowa, 356, and the comment in Cooley on Taxation (356) and Constitutional Limitations (368), it was then said that such a deed cannot be made conclusive evidence of the existence of any essential step or fact in the transaction without violating the fourteenth amendment, which forbids a State "to deprive any person of property without due process of law."

The true rule on the subject seems to be that the Legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all non-essentials or matters of routine which rest in mere expediency; acts which need not have been required in the first place—as the affidavit of the sheriff to the delinquent list—and which the Legislature may by a curative act excuse when omitted. But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these acts and the facts necessary to constitute them, the deed can only be made *prima facie* evidence. Cooley on Taxation, 521.

I think due and reasonable notice of the sale of property for a delinquent tax is generally regarded as necessary to the validity of such sale. Probably no State in the Union authorizes such a sale without requiring public notice of that fact to be given; and in my judgment such notice ought to contain the name of the owner or person to whom the property is assessed. Any one knows, who is at all conversant with the subject, that in looking at a notice of the sale of property for delinquent taxes a person naturally runs his eye along the list of names rather than the figures and abbreviations indicating the location and quantity of the property; and if he does not find his name there or that of any one whom he may represent, he at once concludes that no property in which he is interested is included in the list.

But admitting that the name of the owner is not a necessary part of the notice to be given of the sale of land for delinquent taxes, and that it is sufficient if the statute requires nothing more than a description of the property by metes and bounds or a reference to the public surveys or the lot and block, in case of town property, yet where the statute directs the name to be published the owner has a right to assume that it will be given. Under these circumstances the publication of the name as a part of the notice becomes material, and the omission of it, in my judgment, renders the notice invalid; but where, as in this case, the name of the owner is not only omitted from the notice but another and different one given, the same is actually false and misleading.

It is true that "Hanthorn" and "Hawthorn" are almost identical in orthography. But they are two distinct and well-known English names, quite different in sound and suggestion—as much so as Sawyer and Sayer. Neither is it a case of the mere misspelling of a name as, *C*inclair, *Syn*clair, or Sinclar*e* for Sinclair, or Mac*F*erson or MacP*a*rson for MacPherson, in which the name intended is preserved in the sound and even suggested to the eye. It is not a case of *idem sonans* by any means, but the substitution of one well-known name for that of another, which, though similar in composition, is unlike in sound and suggestion.

Such a notice, in my judgment, is no notice. Indeed it is worse. It is a false notice. A sufficient notice being a material part of a sale, and a sale being an essential part of the proceeding on which the sheriff's deed is based, the want of it may be shown to invalidate the same; and on this conclusion as to the law of the case the defendant is entitled to a finding in her favor.

On February 21, 1887, and since this case was submitted for decision, the Legislature amended said § 90 of the tax law, so as to make a tax deed only *prima facie* evidence of title in the grantee, and required the "party claiming to be the owner as against the holder of the tax title" to tender and pay into court, with his answer, the amount of the taxes for which the land was sold, with interest thereon at 20 per centum per annum from the sale to the date of the deed, and the sheriff's fees for making the certificate and deed, together with any taxes the purchaser may have paid on the property, with interest thereon, for the benefit of the holder of said tax deed, his heirs or assigns, in case the same should be held invalid.

On March 23, 1887, the defendant commenced a suit in equity in this court against the plaintiff herein, under § 500 of the Code of C. P., for the purpose of determining his claim to the premises, alleging that the tax deed under which the plaintiff claims title to the same is void on the grounds herein considered and others, and brought into court and tendered him the sum of $50.60 in payment of what was due him thereon.

I have considered whether this section 90 as amended is applicable as a rule of evidence to the case under consideration. When the State sold these lots to Bennett it entered into a contract with him, the obligation of which it cannot impair by any subsequent legislation. Con. U. S., art. 1, § 10.

But the right to a particular remedy to enforce the contract is no part of the obligation thereof. Neither is it considered a vested right. Therefore the Legislature may modify or change the remedy at pleasure, so long as it does not, under pretense of regulating the remedy, impair the right itself. Cooley on Con. Lim., 361. And the rules of evidence are considered a part of the remedy, so that a party to a contract has no vested right to have a controversy concerning the same determined by the rule of evidence in force when the contract was made. Therefore the rule of evidence in force when the controversy is determined or decided applies. Cooley on Con. Lim., 367; Edwards *v.* Kearzey, 96 U. S., 595.

Accordingly it has been held that a statute which made parties to actions competent witnesses, admitted parol evidence to modify a written contract contrary to the common law, required the purchaser at a tax sale to give notice to the occupant before applying for a deed, changed the burden of proof by making a tax deed *prima facie* evidence of title and the regularity of the prior proceedings or the reverse, or which made a deposition taken *de bene esse*, without notice to the adverse party, *prima facie* evidence of the facts stated, may be applied to existing causes of action. Rich *v.* Flanders, 39 N. H., 323; Gibbs *v.* Gale, 7 Md., 76; Hickox *v.* Tallman, 38 Barb., 608; Howard *v.* Moot, 64 N. Y., 268; Curtis *v.* Whitney, 13 Wall., 68.

But there must be an opportunity given for investigation and trial. The Legislature cannot, under pretense of prescribing rules of evidence, preclude a party from making proof of his right by arbitrarily and unreasonably declaring that on some particular circumstance being shown by the other the controversy is closed by a conclusive presumption in favor of the latter. Cooley on Con. Lim., 368.

It was held in Smith *vs.* Cleaveland (17 Wis., 556) that a tax deed executed under a statute which made it conclusive evidence of the regularity of the prior proceedings, with certain exceptions, could not by a subsequent statute be reduced to mere *prima facia* evidence of such facts. The decision was based on the ground that to allow the character and effect of the deed as a muniment of title to be changed by the subsequent statute would impair the obligation of the contract made by the State with the purchaser.

And no case has been shown in which there was a contrary ruling on like circumstances. Where the deed is only *prima facie* evidence the purchaser takes it, subject to the right of any party adversely interested to overcome this presumption by proof to the contrary. The matter is left open to investigation; and this being so the Legislature may regulate it by shifting the burden of proof back onto the purchaser; but to open a purchaser's title to proof of defects in the prior proceedings when he purchased on the faith of a statute which declared his deed conclusive evidence in his favor on these points is a very different thing. In my judgment it impairs the obligation of his contract. See Corbin *v.* Board of Commissioners, 3 Fed. Rep., 356.

So far, then, as the Legislature had the power and by the act of 1865 did make the tax deed of the plaintiff's grantor conclusive evidence of his title, I do not think the Legislature of 1887 had the power to modify it.

If notice of the sale was not an essential part of the proceeding the Legislature of 1865 had the power and did make the tax deed conclusive evidence on the point; but if the notice was necessary to the validity of the sale, then, as I have concluded, the Legislature did not have the power to make the deed conclusive evidence of the fact.

In either view of the matter the act of February 21, 1887, has no effect on the decision. In the former case, as to this deed, the conclusive effect of the act of 1865 could not be modified, and in the

latter one the deed is only *prima facie* evidence at best; but I am pleased to think that the just and long-needed provision in this act requiring a party who contests a tax title to refund the money, with interest, which has been expended in the payment of taxes for his benefit may be applied to this transaction in the suit in equity.

It is needless to add that the supreme court of the State has not passed on the questions involved in this case, or otherwise I would have been spared the trouble of considering them.

There must be a finding that the plaintiff is not the owner of the premises or entitled to the possession of them and that the defendant is.

Mr. W. Scott Beebe and Mr. John W. Whalley, for the plaintiff; Mr. George W. Durham and Mr. F. A. E. Starr, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed Apr. 22, 1887. R. H. Lamson, clerk.

42 And afterwards, to wit, on Monday, the 2d day of May, 1887, the same being the 12th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN. } No. 1260.

MAY 2, 1887.

This cause was heard upon the petition filed by the plaintiff for a rehearing herein and was argued by Mr. W. S. Beebe, of counsel for said plaintiff; on consideration whereof it is ordered that said petition be, and the same is hereby, allowed, and that the same be set for hearing on Monday, May 9, 1887.

44 And afterwards, to wit, on Monday, the 29 day of August' 1887, the same being the 67th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

45 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN. } No. 1260.

AUGUST 29, 1887.

Now, at this day, upon the suggestion of the court, it is ordered

that this cause be, and the same is hereby, continued for further consideration upon the rehearing thereof until the next term of said court.

46 And afterwards, to wit, on Monday, the 12th day of December, 1887, the same being the 47th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

47 In the Circuit Court of the United States for the District of Oregon.

E. MARX
vs.
IDA J. HANTHORN. } No. 1260.

DECEMBER 12, 1887.

This cause was reheard by the court upon the petition of the plaintiff and was argued by Mr. W. Scott Beebe, of counsel for the plaintiff, and by Mr. F. A. E. Starr, of counsel for the defendant; whereupon it is considered that the findings of the court heretofore filed in this cause be affirmed that at and before the commencement of this suit the defendant, Ida J. Hanthorn, was the owner and entitled to the possession of the real property described in the complaint herein as lots three and four on block "E," in the city of Portland, Multnomah county, Oregon, and that said defendant do have and recover of and from the plaintiff her costs and disbursements herein, taxed at — dollars.

48 And afterwards, to wit, on the 15th day of December, 1887, there was duly filed in said court a cost bill in words and figures as follows, to wit:

49 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Defendant. } No. 1260.

Statement of Disbursements Claimed in the Above-Entitled Cause, viz:

Clerk's fees	$23 00
Marshal's fees	
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	10 00
Attorney's fee for taking — depositions, at $2.50 each	
Master's fees	
Referee's fees	
Disbursements: Copies tax-roll, ass't-roll, d'l'q't tax-roll, etc.	4 50
" sheriff's deeds	2 00
Witness' fees: W. W. Chapman, J. P. O. Lounsdale	3 20
E. Marx, 1 day & one mile	1 60
Total	$44 30

Endorsed: Filed Dec. 15, 1887. R. H. Lamson, clerk.

50 [Endorsed:] No. —. In the circuit court of the United States for the district of Oregon. ——— ———, plaintiff, *vs.* ——— ———, defendant. Cost bill. Filed ——— —, 188–. ——— ———, clerk, by ——— ———, deputy clerk.

DISTRICT OF OREGON, *ss:*

I, Geo. H. Durham, being duly sworn, say I am one of def't's att'ys in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that def't is entitled to recover the same from the plaintiff.

GEO. H. DURHAM.

Subscribed and sworn to before me this Dec. 15, 1887.

R. H. LAMSON, *Clerk*,
By ——— ———, *Deputy Clerk.*

51 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant.

Bill of Exceptions.

Be it remembered that on the 26 day of October, 1886, the above-entitled cause came on regularly for trial before the court and without the intervention of a jury, pursuant to a written stipulation of the parties hereto and the order of the court made pursuant thereto.

Upon said trial it was stipulated by the parties in open court that the defendant, Ida J. Hanthorn, was the owner of the property in controversy during the year 1883 and at the time of the sale thereof for State and county taxes in 1884 for the taxes of 1883, and that she was still such owner unless divested of her title to said property by the sale thereof in 1884 for the said taxes of 1883, and that if her title to said property was divested by said sale and tax proceedings, then that the said plaintiff was the owner thereof.

It was also further stipulated upon the trial that said property in the complaint described was of the value of $6,000.

Plaintiff upon the trial offered and read in evidence a deed from the sheriff of Multnomah county, Oregon, dated July 30, 1886, purporting to convey to J. E. Bennett, the grantee therein named, the premises in controversy, viz., lots 3 and 4, in block "E," in the city of Portland, Multnomah county, State of Oregon, a copy of which is attached hereto and marked "A" and made part hereof.

Plaintiff then introduced and read in evidence a deed executed by said J. E. Bennett to the plaintiff, E. Marx, purporting to convey said property to said Marx. A copy of said deed is hereto attached and marked "B" and is made part hereof.

Plaintiff here rested his case.

Defendant then offered and read in evidence the assessment-roll for said county for the year 1883, a copy of which is hereto attached and marked "C" and made part thereof.

Defendant then offered and read in evidence the tax-roll of said county for the year 1883, a copy of which is attached hereto and marked "D" and made part hereof.

52 Defendant then offered in evidence a certified copy of the delinquent roll, with the warrant to the sheriff to collect said delinquent taxes, for the year 1883; to the offer and introduction of said delinquent roll and warrant and to each thereof the plaintiff duly objected on the ground that the same and each thereof was incompetent, irrelevant, and immaterial, and that the tax deed was conclusive of the matters appearing on said offered papers and of the sheriff's action thereunder and by virtue thereof, and because said offered papers did not avoid said deed.

The court then denied and overruled each and every of said objections; to each and every of which rulings and denials plaintiff then and there duly excepted, which exceptions and every of them were then and there duly allowed by the court; thereupon said delinquent roll and said warrant was read in evidence, a copy of which delinquent roll and warrant is hereto attached and marked "E" and made a part hereof.

Defendant then offered in evidence a certified copy of the sheriff's return of lands sold in said county in 1884 for the delinquent taxes of 1883, so far as the same affected or referred to the property in question, said return containing the printed advertisement or notice of sale given by the sheriff and the return of the lands sold by him for such delinquent taxes, a copy of which is hereto attached and made a part hereof and marked "F." Plaintiff then objected to said offer and to the introduction of said return and of every part thereof in evidence, because the same and every part thereof was incompetent, irrelevant, and immaterial, and for the further reason that said return did not avoid or contradict said tax deed, and because the recitals in said tax deed are conclusive of the matters appearing upon said return, and that said return does not purport to affect or impeach said tax deed, and that said deed cannot be impeached or avoided except for some of the causes enumerated

53 in the statute, viz:

1.

Fraud in the assessment or collection of the tax.

2.

Payment of the tax before sale or redemption after the sale.

3.

That the payment or redemption was prevented by the fraud of the purchaser.

4.

That the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold.

Said objections and each of them were then denied and overruled by the court; to each of said rulings of the court the plaintiff then and there duly excepted, which exceptions and each of them were then and there duly allowed by the court, and said return and advertisement and notice of sale were then admitted and read in evidence; to which admission and reading in evidence plaintiff then and there duly excepted, which exception was duly allowed by the court.

Evidence was also admitted showing that the assessment and levy of taxes on said property had been the same for the years 1878, 1879, 1880, 1881, 1882, 1883, 1884, and that the taxes had been paid pursuant to such assessment and levy, except for the said year 1883, to collect the taxes for which year the sale in question was had.

There was no other evidence in the case tending to affect or impair the validity of the said sale of said premises for said delinquent taxes or the title of the plaintiff thereunder.

This bill of exceptions allowed, settled, and signed by and
54 before me this 24 day of January, 1888.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed Jan. 24, 1888. R. H. Lamson, clerk.

55 STATE OF OREGON, } ss:
Multnomah County, }

I, George C. Sears, sheriff and *ex officio* tax collector of the county of Multnomah and State of Oregon, do hereby certify that I received the delinquent tax-roll for the year 1883, with the warrant for the collection of the taxes therein mentioned and described thereto attached, and to which reference is specially made hereby for the purpose, on the 22nd day of April, 1884, and thereupon I duly levied upon the real estate therein mentioned and described for the reason that, after having made diligent search for, I was unable to find any personal property belonging to the respective delinquents out of which to satisfy the taxes therein assessed against them, and which said real estate is as follows, to wit:

Sheriff's Sale.

By virtue of a warrant issued out of the county court of the State of Oregon for the county of Multnomah, to me directed, commanding me to levy upon the goods and chattels of the delinquent taxpayers named in the delinquent tax-roll for said county for the year 1883, thereto attached, and if none be found then upon the real property as set forth and described in the said delinquent tax-

roll or so much thereof as shall satisfy the amount of taxes charged thereon, together with the costs and expenses, I have duly levied (having been unable to find any goods or chattels belonging to the respective delinquents, hereinafter named) upon the following-described pieces or parcels of land set forth in said tax-roll, lying and being in said Multnomah county, State of Oregon, described and assessed as follows:

"Hawthorn, Ida F., Port., lots 3, 4, bl'k E, $34.32.

56 And after advertising the said real estate by posting printed notices of the time and place of sale in three public places in Multnomah county, Oregon, and by publishing the same notice of sale in the "Daily Oregonian," a daily newspaper of general circulation published in the said county and State, for four weeks successively prior to the said day of sale thereof once each week, by and in all of which said notices and publications the said real estate was fully and particularly described and advertised to be sold at public auction, at the court-house door, in said county and State, on Wednesday, the 18th day of June, 1884, at the hour of 10 o'clock in the forenoon of said day; upon which Wednesday, the 18th day of June, 1884, at the hour of 10 o'clock in the forenoon, at the court-house door, in said county, I offered the said real estate at public auction and then and there struck off and sold subject to redemption as offered to the persons at the prices named, which are as follows:

"F."

Description.	Sec.	Town.	Range.	Acres.	Lots.	Blocks.	Am't tax.	Am't cost.	To whom assessed.	To whom sold.
Port., Carth's Add...	x	x	x	x	All	185	7 80	2 66	Unknown	J. E. Bennett.
" ...	x	x	x	x	3, 4	E	34 32	3 19	Hawthorn, Ida J...	"

That the said purchasers have received from me a certificate of sale as by law required to be given; and I hereby return said delinquent tax-roll for the year 1883 as aforesaid, with the warrant thereto attached, as satisfied only as to the amount hereinbefore set forth.

GEO. C. SEARS,
Sheriff and ex Officio Tax Collector for Multnomah County, Oregon.

57 "E."

Delinquent Tax-Roll of Multnomah County, Oregon, for the Year 1883.

Names of tax-payers.		Description of land.	Section.	Township.	Range.	Acres.	Number of lots.	No. of block.	Value of agricultural land.	Value of each city or town lot.	Value of all city or town lots.	Value of improvements.	Value of merchandise and implements.	Mortgage and other liens on real estate.	Money, notes, and accounts and shares of stock.	Household furniture, pleasure carriages, watches, etc.	No. of horses and mules.	Value.	Number of cattle.
									$	$	$	$	$	$	$	$		$	
	1																		
	2																		
	3																		
	4																		
Hawthorne Ida F.	5	Portl'd	x	x	x	x	3, 4	E	x	x	1,300	900	x	x	x	x	x	x	x
	6																		
	7																		
	8																		
	9																		
	10																		
	11																		
	12																		
	13																		
	14																		
	15																		

STATE OF OREGON, }
County of Multnomah, } *ss:*

I, Geo. C. Sears, sheriff and tax-collector of county of Multnomah and State of Oregon, being first duly sworn, say that all the facts set forth in the foregoing statement, delinquent tax-roll, are correct; the sums therein returned as unpaid are unpaid.

GEO. C. SEARS,
Sheriff of Multnomah County, State of Oregon.

Oregon for the Year 1883.

Value.	Number of sheep & goats.	Value.	Number of swine.	Value.	Gross value of all property.	Indebtedness within the State.	Exemption.	Total value of taxable property.	As equal'z'd by county board.	Poll.	School tax.	State tax.	County tax.	Total tax.		Remarks.	Collected.	Delinquent.
$		$		$	$	$	$	$	$	$	$	$	$	$	1 2 3 4		$	$
x	x	x	x	x	2,200	x	x	2,200	x	x	x	x	x	34.32	5	Sold to J. E. Bennett.		
															6 7 8			

STATE OF OREGON, } ss:
County of Multnomah, }

To the sheriff of Multnomah county:

In the name of the State of Oregon, you are hereby commanded to levy upon the goods and chattels of the delinquent tax-payers, a list of which is hereto annexed, and if none be found within your county, then upon the real property as set forth in such tax-list or so much thereof as shall satisfy the amount of taxes so charged, with costs and expenses, and you are hereby required to pay over all moneys collected by virtue hereof to the county treasurer, and make return of this writ within 60 days from the date on which you receive the same.

In witness whereof I have hereunto set my hand and the seal of the county court of said county this 22d day of April, A. D. 1884.

[COUNTY COURT SEAL.] WM. R. SEWALL, *Clerk.*

58 "C."

Assessment-Roll of Multnomah County, Oregon, for the Year 1883.

Names of tax-payers.	No. of road dist.	Description of land.	Section.	Township.	Range.	Acres.	Number of lots.	No. of block.	Value of agricultural land.	Value of each city or town lot.	Value of all city or town lots.	Value of improvements.	Value of merchandise and implements.	Mortgages and other liens on real estate.	Money, notes, and accounts and shares of stock.	Household furniture, pleasure carriages, watches, &c.	No. of horses and mules.	Value.	Number of cattle.
									$	$	$	$	$	$	$	$			$
Hanthorn, Ida F.	1 2 3 7	Port....	x	x	x	x	3, 4	E	x	x	1,300	900	x	x	x	x	x	x	x

STATE OF OREGON, *Multnomah County,* } ss:

I, I. N. Sanders, county assessor in and for said county and State, do hereby certify that the foregoing contains a list of and to whom personal property is assessed and a description of all lands and lots and blocks and to whom assessed, lying and being in said county, for the year 1883, as can be by me ascertained, and that the aggregate amount of taxable property, personal and real, deducting indebtedness and exemptions, is seventeen millions six hundred and fifty-three thousand one hundred and five ($17,653,105) dollars.

Witness my hand this 27th day of August, 1883.

I. N. SANDERS.

Oregon for the Year 1888.

| | | |

59 "D."

Tax-Roll of Multnomah County, Oregon, for the Year 1883.

Names of tax-payers.		Description of land.					Number of lots.	No. of block.	Value of agricultural land.	Value of each city or town lot.	Value of all city or town lots.	Value of improvements.	Value of merchandise and implements.	Mortgages and other liens on real estate.	Money, notes, and accounts and shares of stock.	Household furniture, pleasure carriages, watches, &c.	No. of horses and mules.	Value.	Number of cattle.
	1								$	$	$	$	$	$	$	$		$	
	2																		
	3																		
	4																		
	5																		
	6																		
Hanthorn, Ida F.	7	Port'l.	x	x	x	x	3,4	E	x	x	1,300	900	x	x	x	x	x	x	x
	8																		
	9																		
	10																		

STATE OF OREGON, } ss:
County of Multnomah, }

I, I. N. Sanders, county assessor in and for said county and State, do hereby certify that the foregoing contains a list of and to whom personal property is assessed and a description of all lands and lots and blocks and mortgages and to whom assessed, lying and being in said county, for the year 1883, as near as can be by me ascertained, and that the aggregate amount of taxable property, personal and real, deducting indebtedness and exemption, is seventeen millions six hundred and fifty-three thousand one hundred and five ($17,653,105) dollars.

Witness my hand this 27th day of August, A. D. 1883.

I. N. SANDERS,
Assessor of Multnomah County, State of Oregon.

STATE OF OREGON, } ss:
County of Multnomah, }

I, Wm. R. Sewall, clerk of Multnomah county, Oregon, do hereby certify that the foregoing assessment-roll for the year aforesaid has been by me compared with the original assessment-roll of said year returned by I. N. Sanders, assessor of said county, and that it is a correct transcript therefrom and of the whole of such assessment-roll as the same appears on file at my office and in my care and custody.

In witness whereof I have hereunto set my hand and affixed the seal of the county court, at Portland, the 17th day of October, 1883.

[COUNTY COURT SEAL.]

WM. R. SEWALL,
County Clerk, Multnomah Co., Oregon.

Oregon for the Year 1883.

Value.	Number of sheep & goats.	Value.	Number of swine.	Value.	Gross value of all property.	Indebtedness within the State.	Exemption.	Total value of taxable property.	As equalized by county board.	Poll.	School tax.	State tax.	County tax.	Total tax.		Remarks.	Collected.	Delinquent.
					$			$			$	$	$	$	1			
															2			
															3			
															4			
															5			
x	x	x	x	x	2,200	x	x	2,200	x	x	9 02	12 10	13 20	34 32	6			
															7			
															8			
															9			
															10			

STATE OF OREGON, } ss:
County of Multnomah, }

To the sheriff of said county, Greeting:

In the name of the State of Oregon and in pursuance of the order of the county court of said county, made and entered at a regular term thereof, to wit, on the seventeenth day of October, A. D. 1883, you are hereby commanded to collect the taxes charged in the foregoing list by demanding payment of the persons charged therein and making sale of the goods and chattels of the respective persons named in said list, if necessary, and that you pay over all moneys by you collected by virtue hereof to the county treasurer of said county, and return this warrant, together with the list aforesaid and an account of your acts endorsed thereon, to the county court of said county on or before the first Monday in April, A. D. 1884.

In testimony whereof I have hereunto set my hand and the seal of said court this 17th day of October, A. D. 1883.

[COUNTY COURT SEAL.]

WM. R. SEWALL,
County Clerk, Multnomah County, Oregon.

60 Know all men by these presents that we, J. E. Bennett and Alvira F. Bennett, his wife, in consideration of five hundred dollars to us paid by E. Marx, do hereby remise, release, and forever quitclaim unto the said E. Marx and unto his heirs and assigns all our right, title, and interest in and to the following-described parcel of real estate, situate in the city of Portland, county of Multnomah, State of Oregon, to wit: Lots three (3) and four (4), in block "E," in the city of Portland, Multnomah county, State of Oregon:

To have and to hold the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said E. Marx and to his heirs and assigns forever.

In witness whereof we have hereunto set our hands and seals this 31st day of July, A. D. 1886.

J. E. BENNETT. [SEAL.]
ALVIRA F. BENNETT. [SEAL.]

Signed, sealed, and delivered in presence of—
W. SCOTT BEEBE.
EDWARD YOCUM.

STATE OF OREGON, } ss:
County of Multnomah, }

Be it remembered that on this 31 day of July, A. D. 1886, before me, the undersigned, a notary public in and for said county and State, personally appeared the within-named J. E. Bennett and Alvira Bennett, his wife, who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same; and said Alvira
61 F. Bennett, wife of said J. E. Bennett, on examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and without fear, coercion, or compulsion from any one.

In testimony whereof I have hereunto set my hand and notarial seal the day and year last above written.

W. SCOTT BEEBE,
Notary Public for Oregon.

62 Whereas George C. Sears, former sheriff of the county of Multnomah, State of Oregon, and *ex officio* tax collector of said county, as such sheriff and tax collector, by virtue of a warrant duly issued by order of the county court of said county, under the seal of said court, attached to the roll of delinquent taxes for the year A. D. 1883, commanding me, in the name of the State of Oregon, to levy upon the goods and chattels of the delinquent tax-payers named in said tax-roll and of the hereinafter-mentioned Ida F. Hanthorn, and if none be found then upon the real property as set forth in said tax list or so much thereof as shall be necessary to satisfy the amount of taxes charged in said tax-roll, with costs and expenses, did, on the 17th day of May, A. D. 1884, duly levy upon the following-described tract or parcel of land, situate, lying, and being in

said county of Multnomah and State of Oregon, and more particularly known and described as lots 3 and 4, in block "E," Portland, Oregon, for said taxes due from the said Ida F. Hanthorn to the State of Oregon and to the said county of Multnomah, together with the costs and charges due thereon, I being unable to find personal property belonging to the said Ida F. Hanthorn out of which to make the same;

And whereas the said real property was duly assessed for the fiscal year 1883 to the said Ida F. Hanthorn and all persons known or unknown, and that said taxes of the said Ida F. Hanthorn were duly levied and assessed on said parcel of land in the year A. D. 1883, and were not and had not been paid at the time and at the sale hereinafter mentioned, — still remained due and unpaid; and whereas notice of said sale was duly given according to law; and
63 whereas the said premises were, on the 18th day of June, A. D. 1884, between the hours of 10 o'clock a. m. and 4 o'clock p. m., in accordance with law, offered at public auction, at the court-house door, in the city of Portland, in said county and State, and was then and there struck off and sold to J. E. Bennett, his heirs and assigns, for the sum of thirty-seven dollars and fifty cents, he being the highest bidder, and that being the best and highest bid therefor, and said parcel of land being the smallest portion of the property levied upon for said tax for which any person bid at said sale a sum sufficient to pay the taxes assessed, as aforesaid, to the said J. E. Bennett, with costs, charges, and interest accruing thereon; and whereas the said J. E. Bennett did, on the 18th day of June, A. D. 1884, pay to said Geo. C. Sears, former sheriff, the said sum of thirty-seven and $\frac{50}{100}$ dollars, the purchase price of said parcel of land, and received therefor a certificate, as provided by law; and whereas more than two years have elapsed since the said sale and no redemption of said premises has been made by any one:

Now, therefore, I, Thos. A. Jordan, sheriff of Multnomah county, State of Oregon, and tax collector of said county, in consideration of the premises and of the said sum of money paid to me as aforesaid, have this day granted, bargained, and sold, and by these presents do hereby grant, bargain, and sell, to the said J. E. Bennett, his heirs and assigns, all of the premises hereinabove described, together with the tenements, hereditaments, and appurtenances thereunto appertaining or in anywise belonging; to have and to hold the same unto the said J. E. Bennett, his heirs and assigns, forever.

In witness whereof I, the said sheriff and tax collector, as such, have hereunto set my hand and seal this 30th day of July, 1886.

THOS. A. JORDAN, [SEAL.]
Sheriff of Multnomah County, State of Oregon, and
Tax Collector of said County,
By A. W. WITHERELL, *Deputy.*

In presence of—
CHAS. G. SCHRAMM.
W. H. WOOD.

64 STATE OF OREGON, } ss:
County of Multnomah, }

This certifies that on this 31st day of July, 1886, before me, the undersigned, a county clerk in and for said county and State, personally appeared the within-named Thos. A. Jordan, by A. W. Witherell, deputy sheriff of the said county of Multnomah, State of Oregon, known to me to be the identical person described in and who, as such sheriff, executed the within instrument, and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

WM. CHURCH, JR., *Clerk.*

[Official Seal of the County Clerk of Multnomah Co., Oregon.]

65 That afterwards, to wit, on the 9th day of March, 1889, there was duly filed in said court an assignment of errors in words and figures as follows, to wit:

66 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant.

Assignment of Errors.

The plaintiff above named, by his attorneys, comes now and files this his assignment of errors and says in the record and proceedings of the above-entitled court in the above-entitled cause, and also in making and entering the judgment therein against the plaintiff and in favor of the above-named defendant, there — manifest error in this, to wit:

1. The court, upon the trial of the above-entitled action, overruled and denied plaintiff's objections to the introduction in evidence of the delinquent tax-roll and warrant, a copy of which is marked "E" and appears in and is a part of the bill of exceptions in this case, and the court also permitted said delinquent tax-roll and said warrant to be read in evidence against plaintiff's objection thereto, and in so deciding the court committed error.

2. The court, upon the trial of said action, overruled plaintiff's objections to the introduction in evidence of a copy of the sheriff's return of the land sold for taxes in the year 1884 for the taxes levied thereon for the year 1883, and overruled plaintiff's objection
67 to said return, and the advertisement and notice of sale, a copy of which return, advertisement, and notice of sale is marked "F" and appears in and is made a part of the bill of exceptions in this case, and the court also then and there permitted such sheriff's return, notice, and advertisement of sale to be admitted and read in evidence against plaintiff's objection thereto, in which such court committed error.

3. The court in its first finding of fact found that the plaintiff was not at the time of the commencement of this action the owner of or entitled to the possession of the property described in the plaintiff's complaint herein, namely, lots three and four, in block "E," in the city of Portland, Multnomah county, State of Oregon, and in so finding and deciding the court committed error.

4. The court in his [its] second finding of fact decided that the defendant was at the time of the commencement of this action the owner in fee and entitled to the possession of said premises, namely, lots three and four, in block E, in the city of Portland, Multnomah county, State of Oregon, and in so finding and deciding the court committed error.

5. The court also decided and found as its conclusion of law that the defendant go hence without day, and that she recover her costs and disbursements in this action to be taxed, and in so finding and deciding the court committed error.

6. The court decided in favor of the defendant and against the plaintiff that the defendant was the owner and entitled to the possession of said premises and that the plaintiff was not the owner or entitled to the possession of said premises, and in so doing the court committed error.

7th. In construing the statute of the State of Oregon in relation to the validity and effect of tax deeds, section 90, page 767, Code, to wit:

68 "SECTION 90. After expiration of two years from the date of such certificate, if no redemption shall have been made, the sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied, that the tax was unpaid at the time of the sale and no redemption has been made, and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in the deed, and upon the delivery of such deed all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes and the sale of the property shall be presumed regular and to have been had and done in accordance with law, and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided except by proof of either—

1. Fraud in the assessment or collection of tax.

2. Payment of the tax before the sale or redemption after sale.

3. That the payment or redemption was prevented by the fraud of the purchaser.

4. That the property was sold for taxes, for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold."

The court ruled that the tax deed offered was not conclusive of the validity and regularity of the advertisement and notice of sale, and in so holding and ruling the court committed error.

8th. In construing the statute of the State of Oregon in relation

to the manner of publishing notice of sale of property for delinquent taxes, section 93, page 768, Code, to wit:

69 "SECTION 93. All sales made for delinquent taxes, as provided in this chapter, upon real estate must be made, as is otherwise made in selling real estate, upon an execution at the court-house door between the hours of 10 o'clock a. m. and 4 o'clock p. m., in the day-time, and notice of such sale shall be given in some public newspaper published in the county where the property is situated, or in case no paper is published in the county, then in the paper published nearest the place of sale and in general circulation in the county, by advertisement for four consecutive weeks before such sale, describing accurately the lots or land to be sold, and that they are to be sold for taxes due thereon."

The court ruled that on the advertisement and notice of sale the name of the owner appeared as "Hawthorn" instead of "Hanthorn," and held that this avoided the sale, notwithstanding the fact that otherwise the land was properly described in the advertisement and notice of sale, and in so holding and ruling the court committed error.

The court, in its findings of fact and in its conclusions of law based thereon and upon record, as appears thereby, committed error in deciding in favor of the defendant and against the plaintiff.

W. SCOTT BEEBE,
GEARIN & GILBERT,
Attorneys for Plaintiff.

Endorsed: Filed March 9, 1889. R. H. Lamson, clerk.

70 And afterwards, to wit, on the 9th day of March, 1889, there was duly filed in said court a bond in words and figures as follows, to wit:

71 In the Circuit Court of the United States for the District of Oregon.

E. MARX, Pl't'f,
vs.
IDA F. HANTHORN, Substituted Defendant in Place and Stead of B. Campbell, Def't.

Know all men by these presents that we, E. Marx, plaintiff, and we, A. E. La Rocque, are held and firmly bound unto Ida F. Hanthorn in the sum of five hundred dollars, to be paid to the said Ida F. Hanthorn, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated February 11, 1889.

Whereas the above-named E. Marx intends to and is about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named E. Marx shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EMIL MARX. [L. S.]
A. E. LA ROCQUE. [L. S.]

Signed, sealed, and delivered in presence of—
—— ——.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, A. E. La Rocque, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of — dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. E. LA ROCQUE.

Subscribed and sworn to before me this 9th day of March, 1889.
[SEAL.] W. SCOTT BEEBE,
Notary Public for Oregon.

Endorsed: No. 1260. U. S. circuit court, district of Oregon. E. Marx *vs.* Ida F. Hanthorn. Bond. Approved. Deady, J. Filed Mar. 9, 1889. R. H. Lamson, clerk, by —— ——, deputy clerk.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, —— ——, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and — holder within said district, and that I am worth, in property situated therein, the sum of — dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

—— ——.

Subscribed and sworn to before me this —— —, 188–.

—— ——.

Approved —— —, 188–.

—— ——.

72 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein E. Marx is the plaintiff and Ida J. Hanthorn, substituted for B. Campbell, is the defendant as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this March 20, 1889.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*
By R. B. LAMSON, *Deputy Clerk.*

73 In the Supreme Court of the United States.

E. MARX, Plaintiff,
vs.
IDA J. HANTHORN, Substituted for B. Campbell, Defendant.

Assignment of Errors.

The plaintiff above named, by his attorneys, comes now and files this his assignment of errors, and says in the record and proceedings of the above-entitled court in the above-entitled cause, and also in making and entering the judgment therein against the plaintiff and in favor of the above-named defendant, there is manifest error, in this, to wit:

1. The court upon the trial of the above-entitled action overruled and denied plaintiff's objections to the introduction in evidence of the delinquent tax-roll and warrant, a copy of which is marked "E" and appears in and is a part of the bill of exceptions in this case; and the court also permitted said delinquent tax-roll and said warrant to be read in evidence against plaintiff's objection thereto, and in so deciding the court committed error.

2. The court upon the trial of said action overruled plaintiff's objections to the introduction in evidence of a copy of the sheriff's return of the land sold for taxes in the year 1884 for the taxes levied thereon for the year 1883, and overruled plaintiff's objection to said return and the advertisement and notice of sale, a copy of which return, advertisement, and notice of sale is marked "F" and appears in and is made part of the bill of exceptions in
74 this case; and the court also then and there permitted such sheriff's return, notice, and advertisement of sale to be admitted and read in evidence against plaintiff's objection thereto, in which such court committed error.

3. The court in its first finding of fact found that the plaintiff was not at the time of the commencement of this action the owner of or entitled to the possession of the property described in the plaintiff's complaint herein, namely, lots three and four, in block "E," in the city of Portland, Multnomah county, State of Oregon, and in so finding and deciding the court committed error.

4. The court in his second finding of fact decided that the defendant was at the time of the commencement of this action the owner in fee and entitled to the possession of said premises, namely, lots three and four, in block E, in the city of Portland, Multnomah county, State of Oregon, and in so finding and deciding the court committed error.

5. The court also decided and found as its conclusion of law that the defendant go hence without day, and that she recover her costs and disbursements in this action, to be taxed, and in so finding and deciding the court committed error.

6. The court decided in favor of the defendant and against the plaintiff that the defendant was the owner and entitled to the possession of said premises, and that the plaintiff was not the owner or entitled to the possession of said premises, and in so doing the court committed error.

7. In construing the statute of the State of Oregon in relation to the validity and effect of tax deeds, section 90, page 767, Code, to wit:

"SECTION 90. After expiration of two years from the date of
75 such certificate, if no redemption shall have been made, the sheriff shall execute to the purchasers, his heirs or assigns, a deed of conveyance reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied; that the tax was unpaid at the time of the sale, and no redemption has been made, and such deed shall operate to convey a legal and equitable title to the purchaser sold in fee simple to the grantee named in the deed, and upon the delivery of such deed all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes and the sale of the property shall be presumed regular and to have been had and done in accordance with law, and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided except by proof or either:

1. Fraud in the assessment of collection or tax.
2. Payment of the tax before the sale of redemption after sale.
3. That the payment or redemption was prevented by the fraud of the purchaser.
4. That the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold"—

The court ruled that the tax deed offered was not conclusive of the validity and regularity of the advertisement and notice of sale, and in so holding and ruling the court committed error.

8. In construing the statute of the State of Oregon in relation to the manner of publishing notice of sale of property for delinquent taxes, section 93, page 768, Code, to wit:

"SECTION 93. All sales made for delinquent taxes, as provided in this chapter, upon real estate must be made, as is otherwise made in selling real estate upon an execution, at the court-house door
76 between the hours of 10 o'clock a. m. and four o'clock p. m. in the day-time, and notice of such sale shall be given in some public newspaper published in the county where the property is situated, or in case no paper is published in the county, then in the paper published nearest the place of sale and in general circulation in the county, by advertisement for four consecutive weeks before such sale, describing accurately the lots of land to be sold, and that they are to be sold for taxes due thereon"—

The court ruled that on the advertisement and notice of sale the name of the owner appeared as "Hawthorn" instead of "Hanthorn," and held that this avoided the sale, notwithstanding the fact that otherwise the land was properly described in the advertisement and notice of sale, and in so holding and ruling the court committed error.

9. The court in its findings of fact and in its conclusions of law based thereon and upon record, as appears thereby, committed error in deciding in favor of the defendant and against the plaintiff.

W. SCOTT BEEBE,
GEARIN & GILBERT,
Attorneys for Plaintiff.

Endorsed: Filed March 9, 1889. R. H. Lamson, clerk.

Endorsed on cover: Oregon C. C. U. S. No. 1289. E. Marx, plaintiff in error, *vs.* Ida J. Hanthorn. Filed October 4, 1889.

1925
148 U.S. 172

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

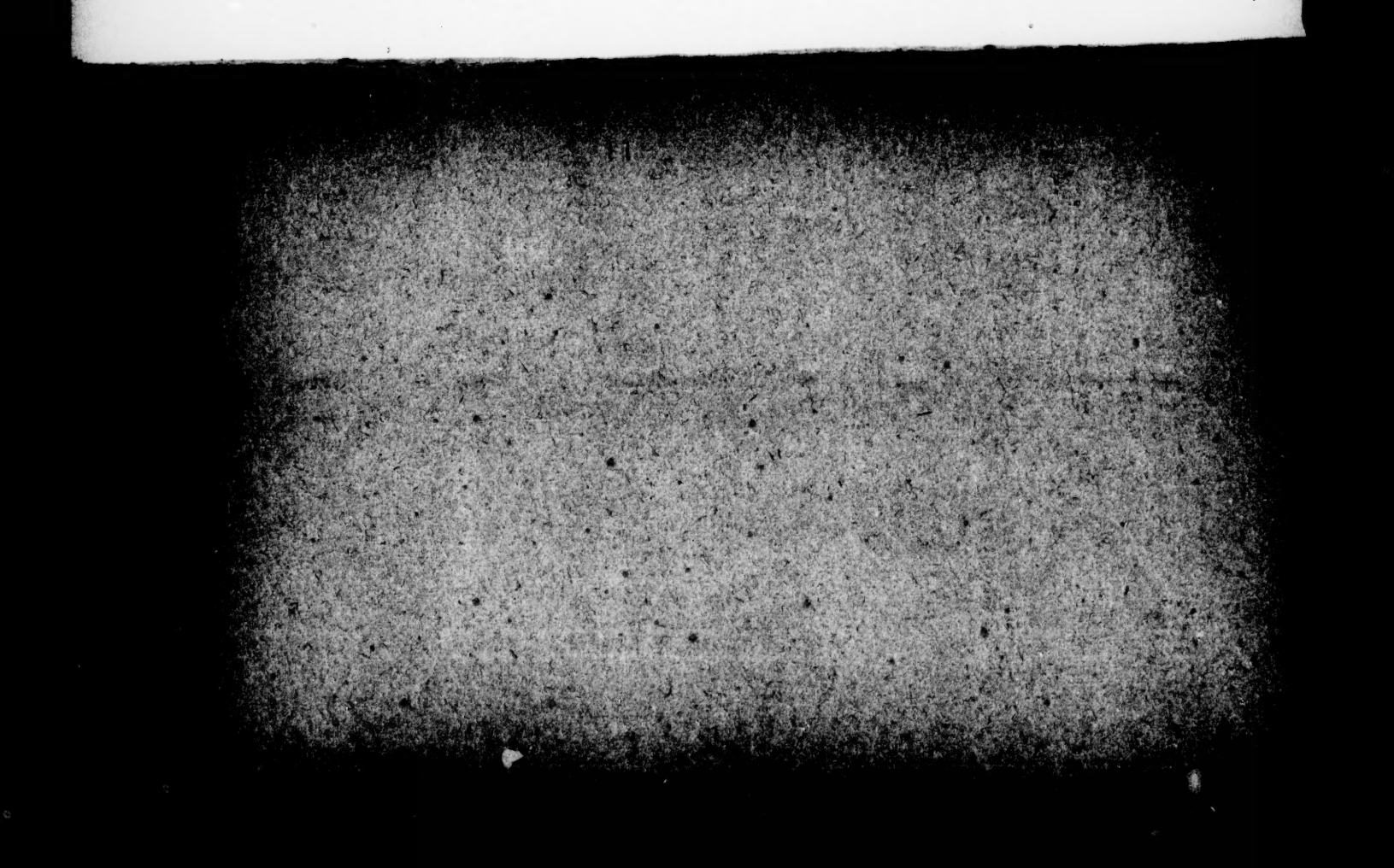
EMIL MARX, Plaintiff in Error,

vs.

IDA J. HANTHORN, Defendant in Error.

Brief for Plaintiff in Error.

Lowman & Hanford Stationery & Printing Co., Seattle.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

EMIL MARX,
Plaintiff in Error,
vs.
IDA J. HANTHORN,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF FACTS.

Plaintiff in error, in 1886, brought this action in the Circuit Court of the United States, for the District of Oregon, to recover the possession of lots three (3) and four (4), in block "E," in the City of Portland, Oregon. It was tried by the Court without the intervention of a jury, and judgment was entered for the defendant.

The property was owned and the taxes paid thereon for six (6) years (except for 1883) prior to June, 1884, by defendant, in which month it was sold by the Sheriff for the unpaid taxes assessed against it for the year 1883.

The time for redemption having expired, the Sheriff, on July 30th, 1886, executed and delivered a tax deed to J. E. Bennett, the tax purchaser and holder of the tax certificate;

and on July 31st, 1884, J. E. Bennet and wife sold and conveyed this property to the plaintiff in error.

At the time of the assessment, sale and execution of the tax deed, and the trial of this action, the Oregon statutes contained the provision that a tax deed "shall operate to convey a legal and equitable title to the purchaser," and that "all proceedings required or directed by the law in relation to the levy, assessment and the collections of the taxes and the sale of the property shall be presumed regular and to have been done in accordance with law—and such deed shall be *prima facie* evidence of title in the grantee; and such presumption and *prima facie* shall not be disputed or avoided except by proof of either—

First, Fraud in the assessment or collection of the tax.

Second, Payment of the tax before sale, or redemption after the sale.

Third, That the payment or resumption was prevented by the fraud of the purchaser.

Fourth, That the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed on the property sold."

General Laws of Oregon, p. 767, Sec. 90.

This property was properly assessed, and the taxes properly levied, but the sheriff advertised and sold it as the land of Ida J. Hawthorn, instead of Ida J. Hanthorn, and the only question involved in this case is whether that fact avoids the sale. The Circuit Court very correctly stated the proposition in the case as follows:

"The question arises, is a tax deed conclusive evidence under the statute of title in the grantee, to the premises therein granted, notwithstanding it appears from the prior proceedings that the property was advertised and sold, not as the property of the owner to whom it was assessed, but as that of another? If the notice of sale was not an essential part of the proceedings the Legislature of 1865 had the power and did make the tax deed conclusive evidence on that point; but if the notice was necessary to the validity of the sale, then as I have concluded the Legislature did not have the power to make the deed conclusive evidence of the tax."

Marx vs. Hanthorn, 30 Fed. Rep., 584-588.

By the assignment of error the case practically comes here for hearing on that one question only—the true name of the owner being Ha*n*thorn; did the fact of its being published Ha*w*thorn in the Sheriff's notice of sale avoid the sale?

ASSIGNMENT OF ERRORS.

The plaintiff above named, by his attorneys, comes now and files this his assignment of errors, and says in the record and proceedings of the above entitled Court in the above entitled cause, and also in making and entering the judgment therein against this plaintiff and in favor of the above named defendant there is manifest error in this, to-wit:

First, The Court, upon the trial of the above entitled action, overruled and denied plaintiff's objections to the introduction in evidence of the delinquent tax roll and warrant, a copy of which is marked "E," and appears in and is a part of the bill of exceptions in this case, and the Court also permitted said delinquent tax roll and said warrant to be read in evidence against plaintiff's objections thereto, and in so deciding the Court committed error.

Second, The Court, upon the trial of said action, overruled plaintiff's objections to the introduction in evidence of a copy of the Sheriff's return of the land sold for taxes in the year 1884, for the taxes levied thereon for the year 1883, and overruled plaintiff's objection to said return, and the advertisement and notice of sale, a copy of which return advertisement and notice of sale is marked "F," and appears in and is made a part of the bill of exceptions in this case, and the Court also then and there permitted such Sheriff's return, notice and advertisement of sale to be admitted and read in evidence against plaintiff's objection thereto, in which such Court committed error.

Third, The Court, in its first finding of fact, found that the plaintiff was not at the time of the commencement of this action the owner of or entitled to the possession of the property described in the plaintiff's complaint therein, namely: Lots three (3) and four (4), in block "E," in the City of Portland, Multnomah County, State of Oregon, and in so finding and deciding the Court committed error.

Fourth, The Court, in his second finding of fact, decided that the defendant was at the time of the commencement of

this action the owner in fee of and entitled to the possession of said premises, namely: Lots three (3) and four (4), in block "E," in the City of Portland, Multnomah County, State of Oregon, and in so finding and deciding the Court committed error.

Fifth, The Court also decided and found as its conclusion of law that the defendant go hence without day and that she recover her costs and disbursements in the action to be taxed, and in so finding and deciding the Court committed error.

Sixth, The Court decided in favor of defendant and against plaintiff that the defendant was the owner and entitled to the possession of said premisess, and that the plaintiff was not the owner or entitled to the possession of said premises, and in so doing the Court committed error.

Seventh, In construing the statute of the State of Oregon in relation to the validity and effect of tax deeds, section ninety (90), page 767, Code, to-wit:

"Section 90. After expiration of two (2) years from the date of such certificate, if no redemption shall be made, the Sheriff shall execute to the purchasers, his heirs or assigns, a deed of conveyance, reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied, that the tax was unpaid at the time of the sale, and no redemption has been made; and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in the deed; and upon the delivery of such deed all the proceedings required or directed by law in relation to the levy, assessment and collection of the taxes, and the sale of the property, shall be presumed regular, and to have been had and done in accordance with law; and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and *prima facie* shall not be disputed or avoided except by proof of either—

(1). Fraud in the assessment or collection of the tax.

(2). Payment of the tax before sale or redemption after sale.

(3). That the payment or redemption was prevented by the fraud of the purchaser.

(4). That the property was sold for taxes for which the owner of the property at the time of the sale was not liable,

and that no part of the tax was levied or assessed upon the property sold."

The Court ruled that the tax deed offered was not conclusive of the validity and regularity of the advertisement and notice of sale, and in so holding and ruling the Court committed error.

Eighth, In construing the statute of the State of Oregon in relation to the manner of publishing notice of sale of property for delinquent taxes, section 93, page 768, Code, to-wit:

"Section 93. All sales made for delinquent taxes, as provided in this chapter upon real estate, must be made as is otherwise made in selling real estate upon an execution, at the Court House door, between the hours of ten (10) o'clock A. M. and four (4) o'clock P. M., in the day time; and notice of such sale shall be given in some public newspaper, published in the County where the property is situated, or in case no paper is published in the county, then in the paper published nearest the place of sale, and in general circulation in the County, by advertisement for four (4) consecutive weeks before such sale, *describing accurately the lots or land to be sold*, and that they are to be sold for taxes due thereon."

The Court ruled that on the advertisement and notice of sale the name of the owner appeared as "Ha*w*thorn" instead of "Ha*n*thorn," and held that this avoided the sale notwithstanding the fact that otherwise the land was properly described in the advertisement and notice of sale, and in so holding and ruling the Court committed error.

Ninth, The Court, in its findings of fact and in its conclusions of law based thereon and upon record as appears thereby, committed error in deciding in favor of the defendant and against the plaintiff.

ARGUMENT.

The names *Hawthorn* and *Hauthorn* are so nearly alike that the rule of *idem sonaus* applies.

In discussing the doctrine of *idem sonaus* the *American and English Cyclopedia of Law, Vol. 16, p. 122*, states the rule as follows:

"The absence of a set of definite rules for the spelling and pronunciation of the names of persons and more especially of surnames, has led the Courts to the adoption of a princi-

ple known as 'the rule of *idem sonaus*. The rule may be stated to be that absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear when pronounced according to commonly accepted methods a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error.'" A large number of authorities are cited in support of this text, from which, as illustrating the holding of the different Courts as to what names are *idem sonaus*, we quote:

Havely and Haverly, 21 Mo., 498.
Robson vs. Thomas, 55 Mo., 582 (Mathews and Mather).
State vs. Scurry, 3 Rich., 68 (Anthorn and Antrum).
State vs. McLaughlin, 52 Ind., 476 (McLaughlin and McGlofflin).
Williams vs. Ogle, 2 Str., 889 (Segrave and Seograiv).
Ward vs. The State, 28 Ala., 53 (Chamble and Chambless).
State vs. Hutson, 15 Mo., 512 (Hutson and Hudson).
Fletcher vs. Conley, 2 Greene (Iowa), 88 (Conley and Connolly).
Gagen vs. The People, 58 Ill., 160 (Danner and Dannaher).
Colburn vs. Bancroft, 23 Pick., 57 (Coburn and Colburn).
Com. vs. Jennings, 121 Mass., 47 (Gigger and Giger).
Tibbitts vs. Kiah, 2 N. H., 557 (Kiah and Currier).
The State vs. Timmins, 4 Minn., 331 (Foural and Forrest).

But conceding for the sake of this argument that Hanthorn is not sufficiently like Hawthorn to warrant us in invoking the rule of *idem sonaus*, appellant insists that the error, if error there be, in the notice of sale is immaterial and does not avoid the deed.

The section of the Oregon statute providing for sales of property for delinquent taxes is found on page 768 of the General Laws of Oregon, is section 93, and reads as follows:

"All sales for delinquent taxes as provided in this chapter upon real estate must be made as is otherwise made in selling real estate upon an execution at the Court-house door between the hours of 10 o'clock A. M., and 4 o'clock P. M., in the day time; and notice of such sale shall be given in some public newspaper published in the County where the

property is situated, or in case no paper is published in the County, then in the paper published nearest the place of sale, and in general circulation in the county, by advertisement for four (4) consecutive weeks before such sale, *describing accurately the lots or lands to be sold, and that they are to be sold for taxes thereon.*"

Section 82, page 766, the General Laws provides as follows:

"A warrant for the purpose of collecting delinquent taxes shall be deemed an execution against the property, and shall have the force and effect thereof against any person, firm or corporation upon whom such taxes are levied or charged in the roll, and shall be executed in like manner except as in this chapter otherwise provided."

And section 83, page 766, of the same statute provides, that a levy may be made "upon any real property of the person, firm or corporation, against whom the taxes are levied or charged."

The warrant for the collection of taxes being thus deemed an execution and to be executed in like manner, we turn to the provisions of the Oregon statute, providing for sales of real estate on execution, viz.:

Section 288, on page 167, which provides that the notice of sale be given: "In case of real property by posting a similar notice (*i. e.*, printed or written notice), *particularly describing the property*, for four (4) weeks successively, in three (3) public places of the County where the property is to be sold, and publishing a copy thereof once a week for the same period in a newspaper of the County, if there be one, or if there be none, then in a newspaper published nearest to the place of sale, or in a newspaper published by the State printer."

These are all the provisions of the Oregon statute, providing for a notice of sale on execution or for taxes. It will be seen that in neither of them is it made necessary by statute for the officer to publish *the name* of the judgment debtor, or the owner of the property against whom the tax is assessed.

The name of the owner, or the person against whom the tax is assessed, is not a part of the statutory notice, but the statute is complied with if the lots or lands are accurately described.

The statute does not require the *owner* to be described or

mentioned in the notice, *but the property must be described.* To state the owner's name does not describe the property or make it more certain of id entification.

But even if the statute had required that the name of the owner should be inserted in the published notice, the failure to do so would not avoid the sale. A statutory provision requiring notice of sale on execution to be given is directory. If a defective notice is given it does not affect the title of the purchaser.

Smith vs. Randall, 6 Cal., 47.
Harvey vs. Fisk, 9 Cal., 93.
Wood vs. Moorhouse, 45 N. Y., 368.
Hudgeon vs. Jackson, 51 Ala., 514.
Lennox vs. Clark, 52 Mo., 115.
Hendricks vs. Davis, 27 Ga., 167.
Gard vs. Luckland, 49 Mo., 451.
Perkins vs. Spaulding, 2 Mich., 157.
Osgood vs. Blackmore, 59 Ill., 261.
Jackson vs. Spink, 59 Ill., 404.
McRea vs. Davnier, 8 Or., 63.

In a tax proceeding, if defective notice or no notice of sale is given, a sale made thereunder is merely irregular and the deed precludes inquiry into, and is conclusive of, the irregularity.

Allen vs. Armstrong, 16 Iowa, 508.
Madisin vs. Sexton, 37 Iowa, 562.
Phillips vs. Meade, 41 Iowa, 470.
Callanan vs. Hurley, 93 U. S., 391.
De Treville vs. Smalls, 98 U. S., 521-526.
Kelly vs. Saunders, 99 U. S., 443-4-5.
Sharply vs. Surdan, 1 Flippin, 447-487.
Sharp vs. Railroad Co., 24 Kansas, 561-2-3.
Virden vs. Risins, 55 Miss., 20-25.
Gwinne vs. Neiranger, 18 Ohio, 400.
Lamb vs. Gillette, 6 McLean, 380.
Ware vs. Little, 35 Iowa, 234.
Halsey vs. Powell, 31 Iowa, 64.
Shawler vs. Johnson, 52 Iowa, 472.

If an execution is valid when no notice or a defective

notice of sale is given a want of such notice will not avoid the tax sale.

Virden vs. Bonrus, 55 Miss., 25.

"Undoubtedly where life and liberty are involved, due process of law requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard, but where the taking of property is in the enforcement of a tax, the proceedings are necessarily less formal, and whether notice to him at all is necessary may depend upon the character of the tax and the manner in which the amount is determinable."

Hagar vs. Reclamation, Dist. 111 U. S., 708.

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited."

Hagar vs. Reclamation Dist., 111 U. S., 709.

REVIEW OF THE AUTHORITIES.

As appears from the authorities quoted *supra* the question involved in this writ of error is not a new question. The principle now contended for by plaintiff in error has the support not only of *every* State Court where it has been passed upon, but it has been declared, affirmed and reaffirmed repeatedly in this Court by the Justices now on the Bench.

In *De Treville vs. Smalls, 98 U. S., 525–6,* this Court had occasion to pass upon the legal effect of a tax certificate issued under the Act of Congress of February 6, 1863.

This Act of Congress of February 6, 1863, is substantially like the Oregon statute respecting the conclusive character of the tax certificate provided for by that act. This Court in construing the effect of such certificate, says:

"All possible attack upon the *prima facies* of the certificate was limited by the express provisions of the act, which provides as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands

subject to the tax every substantial right. It was his duty to pay the tax when it was due. * * * All his substantial rights were assured to him by the permission to show that he owed no tax; that his land was not taxable; that he had paid what was due, or that he had redeemed the land after sale. He was thus permitted to assert everything of substance—everything except mere irregularities.

"We do not feel at liberty to disregard the plain intention of the Acts of Congress. We are not unmindful of the numerous decisions of State Courts, which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement has rendered almost inoperative all legislative provisions for the sale of land for taxes. * * * To meet this tendency of judicial refinement, very many States have of late adopted very rigid legislation. The Act of Congress we are considering must have had it in view, hence the stringent provisions they contain; they declare in effect that the certificate of the commissioners' sale, shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three (3) specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit."

The same question was before this Court again in *Keely vs. Saunders, 99 U. S., p. 444.* Affirming *De Treville vs. Smalls*, this Court then said:

"Thus far we have considered the effect of the proviso to the seventh section of the act of 1863. That should not be overlooked. After having declared that the Commissioners' certificate should be *prima facie* evidence both of the regularity and validity of the sale as well as of the title of the purchaser, Congress went further and enacted that it should be affected as evidence of such regularity, validity and the title, only by establishing one or more of these facts—nonliability of the property for taxes; or that the taxes had been paid before the sale, or that the property had been redeemed. Of what possible use was this proviso unless it was intended to make the certificate conclusive of the validity of the sale and the title of the purchaser, unless it should be impeached by establishing one of the three facts mentioned? If it meant only that the proof of the existence of

one of these facts should destroy the *prima facie* effect of the certificate it was quite superfluous. Without it, if either of these facts existed a sale would have been invalid and the certificate good for nothing, no matter how regularly the sale might have been conducted, or how fully and correctly it might have been advertised, or how accurately might have been the assessment. Congress must have had a purpose in the proviso and what that was it is not difficult to discover. It was not to repeat what had been enacted in the same section. * * *

"The law charged the tax upon the land. The proceeding to collect it was a proceeding *in rem*, of all stages of which the owners had legal notice. It was their duty to pay the tax when due. The commissioners were not bound to hunt them up. *Turner vs. Smith, 14 Wal., 553.* And it is not claimed that either the commissioners or the purchaser had any agency in preventing a redemption, or that there was any obstacle in the way thereof that could not easily have been overcome. While it may be admitted that a statutory right of redemption is to be favorably regarded it is nevertheless true, *that it is a statutory right exclusively and can only be claimed in the cases and under the circumstances prescribed. Courts cannot extend the time nor make any exceptions not made in the statutes.*"

The same question was again brought before this Court in *Sherry vs. McKinley, 99 U. S., 496*, and the holding in *De Treville vs. Smalls* and *Keely vs. Saunders* was affirmed.

The case of *Gulie vs. Kirby Manufacturing Company, 106 U. S., 379*, is in point. This was a Wisconsin case. The land, the title to which was in dispute, was sold for the taxes and *twenty-five cents for stamps.* The statute of Wisconsin limited the time to bring an action to set aside a tax sale to three years. The action was brought after that time, and this Court after conceeding that the land could not be sold for the twenty-five cents for stamps, held that the statute of limitation precluded inquiry into that fact. In deciding the case this Court says, (p. 384, Opinion): "The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed, the statute puts at rest all objections raised, after the time specified against the validity of the tax proceedings from and includ-

ing the assessment of the land to and including the execution of the deed."

In *Barrett vs. Holmes, 102 U. S., 651*, this Court had under consideration the Iowa statute giving effect to tax deeds and providing a special statute of limitations in regard thereto. The statute of Iowa in question after declaring that the tax deed shall be *prima facie* evidence of certain facts, says it (tax deed) "*shall be conclusive evidence that all things whatever required by law to make a good and valid sale and to vest the title of the purchaser were done.*" The statute of limitations was five years. Passing on the objections, that these statutes deprived the land owner of his property without due process of law, this Court says, (p. 656):

"The right of the Legislature to prescribe what shall be the effect of a tax sale and deed, cannot be questioned. The Legislature of Iowa, in the enactments brought to our notice in this case, has exercised the right with great liberality to the purchaser at the tax sale; it has made his deed presumptive evidence of certain facts and conclusive evidence of others; it has decided that it shall vest in him all the estate of the former owner and of the County and State in the premises."

The principle of these cases was recognized and the cases cited with approval in *Springer vs. U. S., 102 U. S., 594.*

"A state has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes no matter who is the owner, or in whose name it is assessed and advertized, and that an erroneous assessment does not vitiate a sale for taxes."

Wetherspoon vs. Duncan, 4 Wal., 217.
Callanan vs. Hidy, 93 U. S., 319.

The case of *Gwinne vs. Neiswanger, 18 Ohio, p. 400*, arose under the Ohio statutes and was a suit in equity. Substantially the same point was involved as here, and in deciding the case the Court says:

"The act then goes on to provide that if the taxes are not paid by a specified time the lands shall be sold. The steps preliminary to a sale are prescribed and after a sale the County Auditor is directed to make a deed to the purchaser which deed shall convey to the purchaser or purchasers, his or their heirs, or assignee or assignees, a good and valid title

to the land so sold; and such deed shall be received in all the Courts of this State as good evidence of title to the purchaser or purchasers, his or their heirs, or assignee or assignees; *nor shall the title conveyed by said deed to the purchaser or purchasers, his or their assignee or assignees, be invalidated or affected by any error previously made in listing, taxing, selling or conveying said land.* Such is the law under which this land was sold and this Court is bound to administer it."

The Court then proceeds to sustain the tax deed under that statute in the face of the following objections appearing on record:

I.

That there was nothing to show that the County Auditor on or before the first day of August, 1828 (the time provided by statute) sent to the Auditor of the State a list as required by law.

II.

The list from the Auditor was not transmitted to the County Auditor in time. It was not received by the County Auditor until October 7th, 1829, and should have been received *one year earlier.*

III.

The hour of the day at which the sale was to commence was not named in the advertisement of sale.

IV.

The return of the Auditor did not show that the sale was at public auction, although the law prescribed that it should do so.

V.

The proceedings did not show that the amount charged was actually due as charged upon the State Auditor's duplicate, while the defendant introduced copies from the book of the Auditor of the State showing that the amount actually due was much less than the amount charged upon the list or duplicate under which the land was sold.

Each of these objections is, to say the least, as ser-

ious as the one urged here, and yet the Court refused under the statute quoted *supra* to consider them, and says, (p. 410):

"The objections which are raised by defendant are objections which do not go to any substantial defect in the proceedings. They are rather to matters of form than of substance. Even if well taken they would not justify this Court in declaring a deed invalid which the law under which it was made declares shall not be invalidated for any error in the listing, selling or conveying said land."

In *Farnsworth Company vs. Rand, 65 Maine, 19,* the taxes were assessed against "*The Farnsworth Manufacturing Company*, when the company's true name was "*The Farnsworth Company.*" The Supreme Court of Maine held the misnomer immaterial, and in deciding the case says, (p. 23, Opinion):

"It is precisely in this part of the work of the Assessors that errors, mistakes and omisions are most liable to occur; and mistakes of this description would commonly be avoided or seasonably corrected if the tax payer obeyed the requirements of the statute and returned a list of his taxable property when the assessors issue their notice.

"If the party is liable to taxation and is in fact the party whom the Assessors intended to tax, it would be manifestly unjust that he should escape taxation for so trivial a cause as an error, mistake or omission in his designation, when his identity with the party designed to be taxed can be established. And the statute was framed to prevent such a result."

In the case of *Bradley et al vs. Bouchard, 48 N. W. Reporter, 208*, the validity of a levy made for delinquent taxes, was passed upon. The property assessed and levied upon was a boom of saw logs; the alleged defect *in the assessment* was that the logs were assessed to one F. E. Bradely instead of to the plaintiffs. The Court, (Sup. Court Michigan), in passing on the case says, (p. 209):

"Their only defence to the tax is that it ought to have been assessed to them instead of to F. E. Bradely. If this does not bring the case within section 89 of the law of 1885 heretofore quoted I cannot imagine a case that the statute would reach where property is assessed 'in the name of any person other than tne owner.'

"The only prejudice to the rights of plaintiffs that I can see is that the property, if this judgment is affirmed, will

not be allowed to escape taxation, but will bear its just proportion of the public burden. If it could be shown that the assessing officer knowingly assessed property in the name of a person other than the owner for the purpose of defrauding or imposing an unjust tax upon him such assessment might be assumed to be to his prejudice in the absence of a contrary showing; but such is not this case by any means."

The statute of 1885 referred to in the opinions is as follows: "No tax assessed upon any property or sale therefor shall be held invalid on account of the property having been assessed without the name of the owner or in the name of any person other than the owner that does not prejudice the rights of the person whose property is taxed."

The case of *McQuade vs. Jaffray, 50 N. W., 233*, is exactly in point here. The court in sustaining the tax deed says: "In the proceeedings before judgment in both the original and published lists the name of the owner was given as *E. S. Jeffery* instead of *E. S. Jaffray*, which was his correct name, and the one in which the title stood of record. It does not appear in whose name the land was assessed, but presumably the same as in the lists. This error in the name of the owner is claimed to be fatal to the validity of the tax judgments in view of the provisions of section 1, chapter 135, Laws, 1881, and section 70, chapter 11, Gen. Stat., that 'the name of the owner shall be given, if known, and if unknown it shall be so stated.' Under our statute, proceedings to enforce the collection of real estate taxes are purely *in rem*. They are against the land. The notice is addressed not to the persons named in the list as owners, but to all persons who have or claim any interest in any of the tracts described in the lists; and they are notified that in case of default judgment will be entered not against them personally but against such pieces or parcels of land. The judgment is against the land and the name of the owner is not required to appear at all. It is elementary that no reference to the name of the owner is necessary in proceedings *in rem*. It is however a common practice in such proceedings to give the name of the owner if known, 'for frankness sake,' to increase the chance of his attention being called to the notice. The provisions of our statute on the subject are but declaratory of this established practice and are to be construed as merely directory. The essential thing in such

proceedings is the description of the *res* (the land), and this is complete without the name of the owners. We think it has been the uniform understanding ever since our present statute was adopted that no error or omission in stating the name of the owner affected the jurisdiction of the Court over the land. In several cases, as in *Association vs. McComber, 41 Minn., 20*, it appeared that the ownership of the land was erroneously stated in the published list. But no suggestion was ever made that this invalidated the judgment. Any such rule would subvert the whole policy of our tax law.

"The statute nowhere makes it the duty of the Assessors or County Auditors to search the record with a view of ascertaining the names of the real owners. Such a search would impose upon them an impossible labor; and even if it were possible to perform it, it would often still remain a doubtful question of law who was the real owner; for, as said in the McComber case, the ownership of land is often a matter of grave doubt and uncertainty."

The case of *Allen against Armstrong, 16 Iowa, p. 508*, is so exactly in point that we desire to especially attract the Court's attention to it here. The case is a tax case, under a statute similar to the Oregon statute, and the objection to the validity of the deed is the same as here.

We quote from the opinion of Judge Dillon as follows:

"On the trial the plaintiff offered in evidence a tax deed for the property in controversy, dated the 11th day of February, 1864, executed by the Treasurer of the County of Tama.

"This deed was in literal compliance with the form prescribed by section 783 of the revision, was properly acknowledged, and was admitted by the defendant to have been duly executed and recorded. The defendant objected to its introduction because the plaintiff had not *first* proved the assessment of the property, levy of taxes and advertisement of sale.

"The main questions in this case arise under section 784 of the revision, being section 74 of the act of April 3d, 1860. No tax law which has ever come under our observation contains provisions so sweeping and stringent as this one.

"From a comparison of it with many of the adjudicated cases upon the subject of tax titles, it seems to have been purposely drawn to outwit Courts, and to prevent them from

resorting to those refined and astute constructions so frequent in cases of this kind, and which are not unreasonably dictated by the policy of the law which disfavors forfeitures, and by the sympathy of Judges, who are naturally ingenious, to prevent the owner of an estate worth hundreds, and it may be thousands, of dollars from having it lost to him for a failure to pay within a specified time a tax of a few dollars.

"This section (784) declares that the County Treasurer's deed shall vest in the purchasers all the right, title, interest and estate of the former owner in and to the land conveyed; that it shall be *prima facie* evidence in all Courts of the following facts: First, That the property conveyed was subject to taxation. Secondly, That the taxes were not paid. Thirdly, That the property conveyed was not redeemed. And shall be *conclusive evidence* of the following facts: First, That the property had been listed and assessed at the time and in the manner provided by law. Secondly, That the taxes were levied according to law. Thirdly, *That the property was advertised for sale in the manner and for the length of time required by law.* Fourthly, That the property was sold as stated in the deed. Fifthly, That the grantee was the purchaser. Sixthly, That the sale was conducted as required by law. Seventhly, That all the prerequisites of the law were complied with by all of the officers from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale and vest the title in the purchaser, were done except in regard to the three points named in this section, wherein the deed shall be *prima facie* evidence only.

Lest there should be any doubt about the meaning of this language it is substantially repeated in the remainder of the section. To same effect, see section 762. It is furthermore provided that "all acts of assessors and other officers *de facto*, shall be deemed and construed to be of the same validity as acts of officers *de jure*." (Rev. St., Sec. 786). In order that the exact case before us and consequently the precise points which we *decide* may be understood, it is proper to remark that it was not pretended by the defendant on the trial that there was no assessment or valuation in fact, or that there was in fact no levy, or that the land was not liable to taxation, or that the taxes had been paid, or that no sale was ever made, or that the land was redeemed, or that there was

any fraud or mistake on the part of either of the officers or the purchaser. The defendant simply offered to show to defeat the plaintiff's deed, *not that the lands were not advertised at all, but that the advertisement was not sufficient and that in it the lands were described as being* delinquent for the year 1839 instead of 1859. He also offered to show that the assessor assessed this property before he was qualified and that after he was qualified he did not reassess it. These objections were overruled and the defendant excepted. And these constitute the only remaining questions which the record presents for our determination.

It may be conceded that the law in question is unnecessary, rigorous and severe, especially in that feature of it which bars the owner in the short space of three years; but this is a question which is committed wholly to the wisdom and judgment of the Legislature. If no provision of the constitution is violated the Court has but one duty to perform, and that is the plain one of administering the law as the Legislature has made it. Applying the principles above stated to the case at bar, we think the decision below was right. *The Legislature might provide for the sale of property for delinquent taxes on a given day without requiring any notice.* And hence they might provide, as they have done in case of ordinary sales on execution by Sheriff that the omission to give notice while it subjects the officers to damages shall nevertheless not affect the validity of the sale. *As it is competent for the Legislature to declare that a notice in all respects regular is not essential so it is competent for it to say that a deed shall, in the purchaser's favor, be conclusive evidence of due notice.* Besides the delinquent is notified by the law itself (Rev. St., Sec. 763) that the sale will take place on the first Monday in October in each year, or on the first Monday of each succeeding month that it can be made. Sec. 776.

The clerical mistake of the year and the other alleged defects in the notice of sale being simply irregularities in the execution of the power and not a vital part of the power itself, falls within the principle just stated; and it is clearly within the power of the Legislature to declare that they are not essential, for such in effect is the provision that the deed shall be *conclusive* evidence of their due performance. At all events the statute is clear, its meaning unmistakable, and we are bound to give it effect so far as it does not violate

the constitutional right of the citizen or property owners. While we have examined the law pre-possessed against it in respect to some of its strongest provisions, yet we unite in the opinion that it is clearly valid so far as respects the objections urged against it by the appellant and more than this we cannot *decide* and need not say.

The case of *Shoup vs. Central Branch U. P. R. Co., 24 Kansas, 546*, is in point. In that case the same alleged defect existed as is urged here, except that in the Kansas case the name was omitted altogether. The Supreme Court of Kansas in passing on the question, says (p. 562):

"The only serious question concerning the alleged defects arises over the omission of the name of the person to whom the land was assessed in the notice of sale and redemption. The tax roll shows the assessment in the name of J. Shoup. The statute in force at the time of the publication of the notice of sale provided that 'the County Treasurer should cause to be published for four consecutive weeks prior to the day of sale, a list of all lands and town lots subject to sale, describing such lands and town lots as the same are described in the tax roll, with an accompanying notice stating that so much of each tract of land described in the list as might be necessary for that purpose, would, in the first Tuesday of May thereafter, and the next succeeding days, be sold by him at public auction at his office for the taxes and charges thereon." Gen. St., 1868, Ch. 107, Secs. 81, 82.

The statute relating to redemption notice in force in 1877 and still in force, prescribes:

"The County Treasurer at least four months before the expiration of the time limited for redeeming lands as aforesaid shall cause to be published in some paper published in or of general circulation in his County, once a week for four successive weeks, a list of all unredeemed land and town lots, describing each tract or lot as the same was described in the tax roll, *stating the name of the person to whom assessed, if any*, and the amount of taxes charged, and interest calculated to the last day of redemption due on each parcel, together with a notice that unless such lands or lots be redeemed on or before *the days limited* therefor, speifying the same, they will be conveyed to the purchasers." (Gen. St., 1868, Ch. 107, Sec. 110; Comp. L., 1879, Ch. 107, Sec. 137).

These provisions regarding the description of land by

the addition of the name of the person to whom assessed, are qualified to some extent by other sections of the statute. Thus, Section 106, Ch. 107, Gen. Stat., 1868 (Sec. 49, Ch. 107, Comp. Laws, 1879), only requires land assessed or entered upon the assessment roll to have the name of the owner inserted when known. Sec. 92, Gen. Stat., 1868 (Sec. 118, Ch. 107, Comp. Laws, 1879), provides:

"When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell it as the property of any person or persons, and no sale of any land or town lots for taxes shall be considered invalid on account of its having been charged on the roll in any other name than that of the rightful owner; but such land must be in other respects sufficiently described on the tax roll and the taxes for which it is sold be due and unpaid at the time of such sale."

This section is supplemented by Section 113 of the General Statutes of 1868 (Sec. 139, Comp. Laws, 1879), that "no irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings shall invalidate any such proceedings or the title conveyed by the tax deed." From these sections we deduce these results, that the assessors are expected to ascertain the names of the owners of the land assessed, and to set opposite each tract or lot on the assessment roll the name of the owner; but when the assessor having jurisdiction and proceeding irregularly in the exercise of it, fails to enter any name, or enters another name than that of the rightful owner, the assessment is not a nullity; further, that a tax sale is not invalid if the land is sold as the property of a person other than the true owner, or if sold without regard to ownership; and finally, that as in the assessment roll and in the tax sale, *the name of the owner of the land is not essential to the validity of the proceedings*, the name of such owner, or the name of the person to whom lands assessed, is not absolutely essential to the sale and redemption notices. *Therefore its omission is only an irregularity.*

The case of "*The Exchange Bank tax cases*," *21 Fed. Rep., 99*, is directly in point here on the principle involved. In that case the effect of the validating act of 1883 was passed upon. The act "legalized and confirmed the assessments contained in the assessment rolls for the several wards of the City of Albany for the years 1876, 1877, 1878,"

(Opinion, p. 101). The defect in the assessments for those years was that the Assessors omitted in those years to place the names of the shareholders upon the assessment rolls in accordance with the requirements of the State laws regulating assessments; "and it was held by this Court in *Albany City National Bank vs. Mahar, 6 Fed. Rep., 417*, that such omission rendered the tax illegal, because the requirement which was disregarded by the Assessor was designed to afford tax-payers an opportunity for the examination and revision of their assessment and therefore should not be deemed directory merely, but essential, and a condition precedent to the validity of the tax." (Opinion, p. 99). The Court in passing on the question says, (Opinion, p. 100):

"Undoubtedly the legislature could not validate a tax which was prohibited by the laws of the United States, but it was competent for them to sanction retroactively such proceedings in the assessment of the tax, as they could have legitimately sanctioned in advance."

And again, (p. 101, Opinion):

"The only objections to the validating act which seems to deserve consideration is found in the circumstances that the tax-payers have not been given an opportunity to be heard until after they were compelled to pay their taxes. The general rule has often been declared *that the Legislature may validate retrospectively any proceedings which they might have authorized in advance.* And it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation. If therefore it was within the competency of the legislation to provide for the collection of a tax by a system which requires the tax-payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing and to obtain restitution, if restitution ought to be made the validating act was unconstitutional." The act of 1883 is sustained and the Court, after reviving the authorities, says, (p. 102, Opinion):

"In view of the large and almost unlimited discretion which resides in the Legislature to regulate the mode and conditions of taxation it is believed to be valid and effectual to legalize the proceedings here."

In the case of *Mattingly vs. District of Columbia, 97 U.*

S., p. 687, this Court having under consideration the effect of these curative statutes says, (p. 690 Opinion): "Congress may legislate within the district respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights. Judge Cooly, in view of the authorities, asserts the following rule: "If the thing wanting or which failed to be done and which constitutes the defect in the proceeding is something the necessity for which the Legislature might have dispensed with by prior statutes, then it is not beyond the power of the Legislature to dispense with it by subsequent statutes. And if the irregularity consists in doing some act which the Legislature might have made immaterial by prior law it is equally competent to make the same immaterial by a subsequent law." *Cooly Const. Lim., 317.* "This rule we think is accurately stated."

In line with these authorities is the decision of this Court in *Holroyd vs. Pumphrey, 18 Howard, 69.* In that case the land was sold to plaintiff in 1846 for unpaid taxes for the year 1844–1845. The land was assessed for these two years as the property of James Thomas. It appeared that James Thomas died in 1842, and that the land had been advertised and sold in 1844 for taxes as the property of the heirs of James Thomas.

This Court sustained the deed made in pursuance of the sale of 1846 and supports its decision by the following statute: "That no sale of real property for taxes hereafter made shall be impaired or made void by reason of such property not being assessed or advertised in the name or names of the lawful owner or owners thereof, provided the same shall be advertized as above directed."

In Oregon it is the land that is taxed. The statute (*Sec. 2,729, Hill's Annotated Laws of Oregon*) provides:

"All taxes for the support of the Government of this State shall be assessed on property in equal and ratable proportion, and all property real and personal within this State,

not expressly exempted therefrom shall be subject to taxation in the manner provided by law."

In *Newby et al. vs. Bronle, 23 Fed. Rep., 322*, the meaning of an exactly similar section in the statutes of Kansas was passed upon and the Court says:

"There is nothing in the statutes of Kansas nor in the theory of taxation which recognizes the taxing of any particular estate or interest on land.

"*It is the land itself that is taxed, and it matters not what may be the condition of the title or who may be the owner.*

"Unless it comes under one of the exemptions named in the statutes it is subject to its burden of the public revenue."

Legislative acts intended to cure and preclude inquiry into defective attempts to exercise the power of taxation have been enacted in many of the States. The power to pass such laws has been uniformally sustained.

In *Williams vs. Supervisors, 122 U. S., 161*, this Court in deciding that question says:

"When directions upon the subject might ordinarily have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation; it is only necessary therefore in any case to consider whether the assessment could have been ordered originally without requiring the proceeding, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they are not essential to any valid assessment and therefore may have been omitted or performed at another time, their omission or defective performance may be excused by the same authority which directed them."

Mattingly vs. District of Columbia, 97 U. S., 687.

Many of the States (including Oregon) provide that after sale of real property upon execution the sale shall be confirmed by the Court.

These statutes provide that such order of confirmation shall be conclusive of the regularity of the prior proceed-

ings; under such a statute the Courts uniformly hold that after confirmation no inquiry can be made, whether the notice or advertisement of sale was regular or not, or whether it was in fact given.

Under such a statute the Supreme Court of Oregon says: "The statute provides and this Court has repeatedly held that an approval of the sale by the Court is conclusive upon all questions arising on the proceedings concerning the sale; that is upon all matters occuring after judgment and prior to the order of confirmation."

Wright vs. Young, 6 Or., 92, 93.
Mathews vs. Eddy, 4 Or., 225.
Dolph vs. Barney, 5 Or., 191.

In a later case where the notice of sale was directly questioned, this Court says:

"The matters complained of were mere irregularities which did not render the sale void, but were such as were cured by the order of confirmation."

McRae vs. Daviner, 8 Or, 63.

"An error in the name of a party, or the amount of a judgment recited in an execution will not avoid a sale of real property."

Jones vs. Dove, 7 Or., 470–1.

If the Legislature can lawfully enact that no inquiry into these questions can be made after confirmation, it certainly can make a tax deed conclusive of the same facts, for both propositions go to the power of the Legislature; if either statute is valid the other must be.

THE EFFECT OF THE ACT OF FERRUARY 21ST, 1887.

We have thus far directed our attention to establishing two propositions, viz:

I.

The proceedings leading up to the tax sale in this case, including the Sheriff's advertisement of the delinquent tax list, were in all respects regular.

II.

Even if they were irregular in the matter of the publication of the delinquent tax list, the deed precluded inquiry into that fact, and the conclusive presumption provided for by statute operated in favor of plaintiff in error.

Nor do we concede that any other question can be legitimately presented here for consideration. We are advised, however, that an attempt, unsuccessfully made in the Court below, will be repeated here, to claim some advantage from an act of the Legislative Assembly of the State of Oregon, passed after the trial of this action in the lower Court. And to the claim which will be thus set up we desire now to address ourselves.

The tax sale in this case took place July 18th, 1884. The tax deed was executed July 29th, 1886. Complaint was filed August 3d, 1886, and the case tried October 22d, 1886. The decision of the Court was filed April 22d, 1887.

THE ACT OF FEBRUARY 21ST, 1887.

The Legislative Assembly of Oregon, on February 21st, 1887, passed the following act, viz:

"Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That section 90, title 6, of chapter 57, of the Miscellaneous Laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane, be amended so as to read as follows:

Sec. 90. After the expiration of two years from the date of such certificate, if no redemption shall have been made, the Sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance, reciting or stating a description of the property sold as described in the assessment roll, the amount bid, the year in which the tax was levied, to whom the same was assessed, that the tax was unpaid at the time of the sale, and that no redemption has been made; and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in such deed. Upon making such deed the Sheriff shall take up the certificate of sale therefor issued to the purchaser and shall file the same with the County Clerk, and the same shall be a public record; and upon the deliv-

ery of such deed all the proceedings required or directed by law in relation to the levy, assessment and collection of the taxes and the sale of the property shall be presumed regular, and such deed shall be *prima facie* evidence of title in the grantee. And in any action, suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, the defendant or party claiming to be the owner, as against the holder of the tax title, must with his answer tender and pay into Court the amount of taxes for the payment of which the lands were sold, together with interest thereon at twenty per cent. per annum from the date of the sale to the date of the said tax deed, together with the Sheriff's fees for making said certificate and Sheriff's deed, and also any taxes the purchaser may have paid on said lands, with interest thereon from the date of payment to date of filing said answer, for the benefit of the holder of said tax deed, his heirs and assigns, in case the tax title should in said action, suit or proceeding."

On March 23d, 1887, the defendant in error began a suit in equity in the Court below against plaintiff in error, setting up this statute and seeking relief under it. That suit, as appears from the opinion of the Court in this case, was decided advercely to defendant in error, and no appeal has ever been taken from such decision. Judge Deady, in passing upon the question, says:

"I have considered whether this section 90, as amended, is applicable as a rule of evidence to the case under consideration. *When the State sold these lots to Bennett it entered into a contract with him the obligation of which it cannot impair by any subsequent legislation.*" (See page 22 Record in the case).

If any claim should be made here that defendant in error is benefitted by the act of 1887, we answer that such can not be the case, for two reasons:

I.

This act does not operate on plaintiff's tax deed. It does not purport to, and can not if it did, affect a deed made before its passage.

THE CONTRACT OF PURCHASE.

"Now the purchase at a tax sale is clearly a contract. It is made under the law as it then exists und upon the terms prescribed by the law. No subsequent statute can import new terms into the contract or add to those before expressed."

Cooley on Taxation, 545.

"A purchase at a tax sale is a contract between the State and the purchaser, the terms of which are embodied in the law in force when the sale is made."

The State vs. Foley, 30 Minn, 350.

To the same effect are the following decisions, to which the attention of the Court is earnestly directed and especially to the case of *Smith vs. Cleveland, 17 Wis., 556*, to which decision is appended a decision by Judge Miller:

Corbin vs. Commissioners, 3 Fed. Rep., 356.
Bruce vs. Schuyler, 4 Gil. (Ill.), 221.
Smith vs. Cleveland, 17 Wis., 556.

THE OBLIGATION OF A CONTRACT.

Under these authorities the sale to Bennett in this case was clearly *a contract*, made under the statute in existence at that time. The State said to the purchaser: In consideration of your paying this tax we will now sell you this land and will give you a certificate of purchase. If the land is not redeemed in two years we will make you a deed for it, which deed shall not be open to attack except upon the four grounds mentioned in the statute. Relying on this promise by the State, Bennett, the purchaser, paid his money. The promise as to the character of the deed to be given was a part of the inducement which led him to purchase. The State promised him a warranty deed, with the exception of the four specified objections which might be urged, took his money upon the faith of that promise, and

complied with the promise and gave him the deed. The contract was then entirely consummated between the parties. Can the State then, by subsequent legislation, change the character of that deed, make that a quit-claim which before was a warranty and annul its contract after receiving the benefit of it? Such a claim is wrong in principle and unsustained by authority.

This precise question came up in *Smith vs. Cleveland, 17 Wisconsin, p. 569*, where the Wisconsin Legislature attempted to do the very thing sought to be accomplished by this act of 1887. The Supreme Court of Wisconsin in deciding such attempt unconstitutional says:

"And this we think to be the sound rule upon the subject: that whatever the parties are authorized to and do, stipulate for at the time of making the contract, or whatever provisions of law are then in force, regulating the contract, either as to its construction or legal effect, or materially advantageous to one party or disadvantageous to the other, as to all such the Legislrture has no power afterwards to interfere to change or modify the rights and relations thereby established. The deed in question was executed the 27th of November and recorded on the 1st of December, 1858. At that time the title of the purchaser was valid and absolute as against the irregularities now urged, and remained so until the 19th day of March, 1859. Courts of Justice must so have decided had the case then arisen. This was a most material and important advantage to the purchaser, and could not have escaped his attention. It concerned the life and the validity of the contract. Could the Legislature afterwards step in and take it away and thus remove the foundation of his right? Can the Legislature say as to contracts past and executed that they shall mean one thing today and another to-morrow? That they shall have one construction or effect at the time of execution and another afterwards? That the title of the purchaser by deed at first indefeasable shall afterwards be defeasable? If these things can be done then certainly the protection afforded by the Constitution to private rights is very slight and inadequate. But as has already been often decided, the Legislature is deprived of this power. The construction and effect given by law to a contract at the time of its execution inhere in and continue a part of it ever after, so that no future Legislature can impair the obligations or divest the rights thus created.

By this rule then the claims of the respective parties must be judged. They must stand or fall by the law as it existed at the time of the execution and recording of the tax deed."

In *Garrett vs. Wiggins*, *1 Scammon*, the Supreme Court of Illinois had under consideration a similar statute to the one here in question. Land was sold for taxes January 17, 1829, under tax law of 1827. The deed was not executed until 1831. The law of 1827 was changed in 1829, after the sale. The Illinois Court held that the law of 1827 governed, and says, (1 Scammon, p. 336):

"This last statute is essentially different from the preceding one upon the same subject, and it is contended dispenses with proof on the part of the purchaser at an Auditor's sale of the prerequisites of the statute. But we are not called upon in this case to give a construction to that statute, as I am clearly of opinion that it is not applicable to this case. Without the clearly expressed intention of the Legislature, Courts will not give to a law a retrospective operation, even where they might do so without a violation of the permanent law of the Constitution. But no such intention can be collected from the law of 1829. Its language and objects are prospective. It relates only to contracts and proceedings under its provisions, and cannot by a fair construction be so extended as to interfere with or impair prior contracts, rights or obligations. The fact of the deed not having been executed until after the statute of 1829 went into operation has no influence upon the character of the transaction. The statute under which the sale was made gave to the purchaser, at his option, the privilege of demanding from the Auditor a deed immediately or of taking a certificate of purchase, and waiting for his deed till the expiration of two years. In either case the form of the deed was the same; either would contain the same reservation in favor of the right of redemption, which by the law was two years, when the owner was of age, and in the case of an infant one year after he came of age. If the purchaser, Higgins, had demanded and received this deed at the time time of sale, I presume it would not be contended that a subsequent law would change its effect and operation. *The Auditor's sale constituted a contract between the State and the purchaser, which, in connection with the then existing law, determined the rights and obligations of the parties.*

The certificate of purchase in the one instance, and the deed in the other, are but the evidence of the contract, and that must be construed with reference to the law in force at the time it was entered into. A different rule would substitute the varying will of the Legislatures for the intentions and stipulations of contracting parties."

In *Corbin vs. The Commissioners, Etc., 3 Fed. Rep.*, a very similar question was before the Court. The tax law of Kansas from 1876 to 1879 provided that if, on account of irregularities or invalidity, a tax sale could not be consummated the purchaser should have back his money paid at the tax sale, with interest. In 1879 the Legislature sought to amend this law by providing that the purchaser should not receive his money back in any case, unless the County Commissioners should see fit so to order, and attempted to make the law so amended apply to tax sales already had.

Judge McCrary decided the amendment unconstitutional, and after reviewing the different acts of the Legislature, says, (p. 361):

"This legislation did not of itself amount to a contract, but I think it did amount to a proposition on the part of the State, which, when accepted and acted upon, became a contract binding upon the State as well as upon the other party. In the present case the proposition embodied in the statute was accepted by the plaintiff. Upon the faith of it he invested his money. I know of no element of a contract that is wanting. There was a stipulation by the agreement of minds, upon a sufficient consideration, that the plaintiff having bid off the lands at a tax sale, and paid his money therefor, should be entitled to receive his money and interest from the County treasury if, by reason of irregularity or invalidity, the sale could not be consummated. *Farrington vs. Tenn., 95 U. S., 679.* I am of opinion therefore that the acts of 1868 and 1876, and what was done under them, amounted to a contract within the meaning of the contract clause of the Constitution of the United States. *Const., Art. 1, Sec. 10.* It only remains to be determined whether the act 1879, passed after this suit was brought, impairs the obligation of the pre-existing contract. Upon this point there can scarcely be a doubt."

To the same effect we cite:

Cooley on Taxation, pp. 80, 81, 544, 545.

Cooley Constitutional Limitations, pp. 346, 353, 354, 355.

Robinson vs. Hoon, 13 Wis., 341.
State vs. Commissioners, 4 Wis., 414.
Von Hoffman vs. Quincey, 4 Wal., 535.
Muncy vs. Charleston, 96 U. S., 432.
Green vs. Riddle, 8 Wheaton, 1.
Ogden vs. Sanders, 12 Wheaton, 257.
Walker vs. Whitehead, 16 Wal., 314.
Sturgiss vs. Crowninshield, 4 Wheat., 122.
Edwards vs. Kenzy, 96 U. S., 595.
Green vs. Burry, 15 Wal., 610.
Edmunds vs. Gurgeson, 11 Mo., 344.
State vs. Foley, 30 Minn., 350.

II.

But conceding that this law of 1887 is constitutional and applicable to the present case, of what benefit can it be to the defendant in error? It substitutes a *prima facie* presumption for a *conclusive* presumption. But a *prima facie* presumption in the absence of attack is as good as a conclusive presumption. No attack was attempted to be made upon the regularity of these proceedings, except as to the publication of the *name* in the delinquent list—something not required by the statute. The record is all here, and it is not pretended that any irregularity can be shown but this. And the authorities hereinbefore referred to conclusively show that this, even if open to attack, would not vitiate the sale. On the record as made we need no presumption, either conclusive or *prima facie*.

No case can be cited sustaining defendant's view on this point except one, *Strode vs. Wascher, 17 Oregon, p. 50.* We shall not attempt an analysis of that decision. It is *sui generis.* It stands alone, unsupported by reason or authority, in the long line of decisions, State and Federal, upon the question of the power of the State to impair the obligation of a contract.

Besides, whatever effect that decision may have as to guiding future judicial utterances in the State Courts in Oregon it can have no effect here. The question involved is a Federal question, and the Federal Courts, not the State Courts, declare the law.

If the authorities above quoted are to be followed, the decision of the lower Court must be reversed, and that Court

ordered to enter judgment for the plaintiff and plaintiff in error. No good object could be attained by sending the case back for a new trial, as all the facts are now before this Court, and a decision of the point involved in this writ of error is a decision of the case on the merits.

Redfield vs. Parks, 132 United States, 239, was a writ of error to the Circuit Court of the United States for the Eastern District of Kansas. The case arose under the tax law of Arkansas, and the principle involved was the same as in this case. In that case this Court, after passing upon the questions involved, entered the following order, (p. 252, Decision):

"*Reversed: And as the finding of facts by the Court is before us, and these are the only matters worth attention, it is ordered that the Circuit Court enter judgment for the plaintiff.*"

We have carefully examined every authority within our reach upon this subject, and have not found one which, under a statute like the Oregon statute, would sustain respondent's contention. The overwhelming weight of authority sustains our contention. Nor can the respondent be heard to complain. She knew that her property was properly assessed and correctly extended on the tax roll. *She knew she had not paid the taxes* and that a sale therefor would take place. *She knew by statute* when a warrant would issue for collection of the taxes, and *she knew by statute* what the notice of sale should contain, and she could by inspection have discovered that her property was "accurately described" *therein*; knowing that the tax was unpaid, defendant knew it would be sold, and that if sold she could redeem, within two years; knowing this, she refused to pay her taxes or to redeem after sale, and preferred to stake her property upon the proposition that the substitution of a "w" for an "n" in her name would avoid a sale of her property, and enable her to escape payment of her taxes. Defendant's name was not required by any law of this State to be stated either correctly or incorrectly in the notice of sale, and she was bound to know it. There is no *pretense that she ever tried to pay the tax, or was misled by the notice.* But she simply did not pay her taxes, and now asks to be relieved from her neglect solely because of a superfluous mis-spelled name in the notice of sale. She stood upon her technical rights. She appealed to the law and the law is against her. We respect-

fully ask for a reversal of the judgment and an order to the Court below to enter judgment for the plaintiff.

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